Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

McCLELLAN ECOLOGICAL SEEPAGE SITUATION, MARY FISHER, and CHARLES YARBROUGH,

Petitioners,

v.

WILLIAM J. PERRY, SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. section 9613(h), bars suits to enforce the Clean Water Act and the Resource Conservation and Recovery Act at facilities engaged in remedial actions under CERCLA.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.1, petitioners state that they are a not-for-profit organization and individuals and have no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	ii
OPINIONS DELIVERED IN THE CASE	1
STATEMENT OF JURISDICTIONAL GROUNDS	1
STATUTE INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	2
JURISDICTION IN THE DISTRICT COURT	6
INTRODUCTION	6
ARGUMENT	9
I. *THE NINTH, THIRD, SEVENTH, AND EIGHTH CIRCUITS' OPINIONS ADDRESSING § 113(h) OF CERCLA CONFLICT WITH THE FIRST, SECOND, AND TENTH CIRCUITS' OPINIONS ADDRESSING § 113(h) OF CERCLA*	9
II. *THIS CASE INVOLVES AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT YET BEEN ADDRESSED, BUT SHOULD BE ADDRESSED, BY THIS COURT*	14
A. *CERCLA Was Not Intended to Preempt Other Pollution Control Statutes*	16
1. *The Ninth Circuit improperly ignored the express savings provisions of CERCLA*	18
2. *The legislative history of CERCLA indicates that Congress did not intend § 113(h) to impliedly repeal the citizen suit provisions of RCRA and the CWA*	20
B. *EPA Recognizes that RCRA Enforcement Actions at Sites Engaged in Remedial Action Under CERCLA Are Not Precluded by § 113(h)*	24

TABLE OF CONTENTS – Continued

Page

C. *The Fact That Complying with RCRA and the CWA Would Require the Expenditure of Resources Does Not Make This Case a Challenge to the Cleanup Plan* 27

D. *The Fact That EPA and California Will Have Additional Regulatory Authority at the Base If Respondent Complies With RCRA and the CWA Does Not Make This Case a Challenge to the Cleanup Plan* 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S. Ct. 1507 (1967) 16, 20

Ardestani v. INS, 502 U.S. 129, 112 S. Ct. 515, 116 L.Ed.2d 496 (1991) 20

Arkansas Peace Center v. Arkansas Dept. of Pollution Control, 999 F.2d 1212 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1397 (1994) 5, 6, 7, 9, 12, 13

American Lung Ass'n v. Kean, 1987 U.S. Dist. LEXIS 15158, 26 ERC 1865, 18 Envtl. L. Rep. 20,317 (D.N.J., Civ. No. 87-288, Nov. 19, 1987), *aff'd*, 871 F.2d 319 (3d Cir. 1989) 29

Barnes v. United States District Court, 800 F.2d 822 (9th Cir. 1986) 22

Block v. Community Nutrition Inst., 467 U.S. 340, 104 S. Ct. 2450 (1984) 14, 17

Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d Cir. 1991) 4, 7, 9, 12, 21

Chemical Waste Management, Inc. v. EPA, 673 F. Supp. 1043 (D. Kan. 1987) 11

County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 112 S. Ct. 683 (1992) 17

Crandon v. United States, 494 U.S. 152, 110 S. Ct. 997 (1990) 21

TABLE OF AUTHORITIES – Continued

Page

EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64, 101 S. Ct. 295 (1980) 28

In re Chateaugay Corp., 944 F.2d 997 (2nd Cir. 1991) 7, 9, 10, 11

J.V. Peters & Co. v. EPA, 767 F.2d 263 (6th Cir. 1985) 22

King v. St. Vincent's Hosp., 502 U.S. 215, 112 S. Ct. 570 (1991) 21

Kremer v. Chemical Constr. Corp., 456 U.S. 461, 102 S. Ct. 1883 (1982) 17

McClellan Ecological Seepage Situation (MESS) v. Cheney, 763 F. Supp. 431 (E.D. Cal. 1989) 1

McClellan Ecological Seepage Situation v. Cheney, 20 Envtl. L. Rep. 20,870 (E.D. Cal. 1990) 1

McClellan Ecological Seepage Situation v. Cheney, 20 Envtl. L. Rep. 20,877, 1990 WL 117920 (E.D. Cal. 1990) 1

McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 63 USLW 2543, 39 ERC 2089 (9th Cir. 1995) 1, 6, 7

McClellan Ecological Seepage Situation (MESS) v. Weinberger, 655 F. Supp. 601, 25 ERC 1480, 17 Envtl. L. Rep. 20,344 (E.D. Cal. 1986) 1

McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182, 28 ERC 1282, 19 Envtl. L. Rep. 20,124 (E.D. Cal. 1988) 1

TABLE OF AUTHORITIES - Continued

Page

Public Interest Research Group of New Jersey, Inc. v. Top Notch Metal Finishing Co., 1987 U.S. Dist. LEXIS 15163, 26 ERC 2012 (D.N.J., Civ. No. 87-3894, Nov. 6, 1987) 29

Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991) 8, 9, 11

Reynolds v. Lujan, Civ. No. 90-902, 1992 WL 39789 (D.N.M. Jan. 15, 1992) 4

Rusk v. Cort, 369 U.S. 367, 82 S. Ct. 787 (1962) 21

Schalk v. Reilly, 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990) 6, 7, 9, 12

United States v. Allegan Finishing Co., 696 F. Supp. 275 (W.D. Mich. 1988) 28

United States v. Ciampitti, 583 F. Supp. 483 (D.N.J. 1984) 28

United States v. Colorado, 22 ELR 20,008 (D. Colo. 1991), *rev'd*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 922 (1994) 4

United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 922 (1994) ..... *passim*

United States v. Liviola, 605 F. Supp. 96 (N.D. Ohio 1985) 28

United States v. Outboard Marine Corp., 789 F.2d 497 (7th Cir.), *cert. denied*, 479 U.S. 961, 107 S. Ct. 457 (1986) 22

United States v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314 (D.S.C. 1988), *aff'd in part, rev'd in part on other grounds*, 865 F.2d 1261 (4th Cir. 1988) 28

TABLE OF AUTHORITIES – Continued

Page

Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986) 22

Werlein v. United States, 746 F. Supp. 887 (D. Minn. 1990) 4

Wheaton Indus. v. EPA, 781 F.2d 354 (3d Cir. 1986) 22

Yslava v. Hughes Aircraft Co., 845 F. Supp. 705 (D. Ariz. 1993) 11, 12

STATUTES

28 U.S.C. § 1331 6

28 U.S.C. § 1367 6

29 U.S.C. § 1254(1) 2

33 U.S.C. § 1311(a) 15

33 U.S.C. § 1323 ..... 9, 15, 16

33 U.S.C. § 1365 ..... 6, 15

42 U.S.C. § 6924(a) 14

42 U.S.C. § 6930(a) 15

42 U.S.C. § 6961 ..... 8, 15, 16

42 U.S.C. § 6972(a) 6, 15, 19

42 U.S.C. § 6972(b)(2)(B) 19

42 U.S.C. § 9604(a)(1) 14

42 U.S.C. § 9605(a) 14

42 U.S.C. § 9613(h) ..... *passim*

42 U.S.C. § 9620(i) 18

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 9652(d) 8, 15, 16, 18

42 U.S.C. § 9659 24

Calif. Water Code, Div. 7, Ch. 4, Art. 4 § 13260(c) 15

REGULATIONS

40 C.F.R. § 270.13(h) 15

RULES

Supreme Court Rule 10.1 2

Supreme Court Rule 29.1 ii

LEGISLATIVE HISTORY

132 Cong. Rec. H9600 (daily ed. Oct. 8, 1986, comment of Rep. Roe) 22, 23

132 Cong. Rec. S14814 (Oct. 3, 1986, comment of Sen. Mitchell) 23

132 Cong. Rec. S14895, 99th Cong., 2d Sess. (daily ed. Oct. 3, 1986) 23, 24

H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 266 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835 .....21, 23

Superfund Reauthorization: Judicial and Legal Issues: Hearings on H.R. 2817 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 1st Sess., House of Representatives 57 (1985) (statement of F. Henry Habicht II, U.S. Ass't Att'y Gen., Dept. of Justice, Land & Natural Resources Div.) 21

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

52 Fed. Reg. 27,620 (1987) 3
54 Fed. Reg. 10,520 (1989) 15, 25
54 Fed. Reg. 41,000 (1989) 25
55 Fed. Reg. 8,696 (1990) 25

OPINIONS DELIVERED IN THE CASE

The references to the official and unofficial reports of opinions delivered in this case are as follows:

McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601, 25 ERC 1480, 17 Envtl. L. Rep. 20,344 (E.D. Cal. 1986).

McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 28 ERC 1282, 19 Envtl. L. Rep. 20,124 (E.D. Cal. 1988).

McClellan Ecological Seepage Situation v. Cheney, 763 F. Supp. 431 (E.D. Cal. 1989).

McClellan Ecological Seepage Situation v. Cheney, 20 Envtl. L. Rep. 20,870 (E.D. Cal. 1990).

McClellan Ecological Seepage Situation v. Cheney, 20 Envtl. L. Rep. 20,877, 1990 WL 117920 (E.D. Cal. 1990).

All five opinions were appealed to the Ninth Circuit. Ninth Circuit orders and opinions include:

McClellan Ecological Seepage Situation v. Aspin, unpublished Order, 91-16467/91-16308 (9th Cir., Jul. 8, 1993), remanding.

McClellan Ecological Seepage Situation v. Aspin, unpublished "Findings and Determination Re: Jurisdiction" on remand, Civ. No. S-86-475-WBS (E.D. Calif., Oct. 28, 1993).

All vacated by:

McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 39 ERC 2089 (9th Cir. 1995).

STATEMENT OF JURISDICTIONAL GROUNDS

The Ninth Circuit entered judgment in this case on January 30, 1995. This Court has jurisdiction to review the

case by writ of certiorari pursuant to 29 U.S.C. § 1254(1). This case is appropriate for review on writ of certiorari under Supreme Court Rule 10.1(a), because the Ninth Circuit's decision conflicts with decisions of the First, Second, and Tenth Circuits on the same matter. This case is also appropriate for review on writ of certiorari under Supreme Court Rule 10.1(c), because the Ninth Circuit's decision addresses an important question of federal law which has not been, but should be, settled by this Court.

STATUTE INVOLVED IN THE CASE

This case turns on the proper interpretation of § 113(h) of CERCLA, 42 U.S.C. § 9613(h), which provides:

> Timing of review
>
> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following: [listing five exceptions which are not relevant in this case].

STATEMENT OF THE CASE

Since the 1930's, McClellan Air Force Base in Sacramento, California, has served as an aircraft depot and maintenance center for the Department of Defense. Respondent has disposed of enormous quantities of toxic and hazardous wastes by burying the wastes in unlined earthen pits on the Base. Some of the wastes are now

leaching into the groundwater beneath the Base, and discharging into surface waters that cross the Base. These wastes include industrial solvents, caustic cleaners, heavy metals, polychlorinated biphenyls (PCBs), oils and lubricants, contaminated jet fuel, low-level radioactive wastes, electroplating chemicals and several volatile organic compounds (VOCs). Petitioners live on the edge of the Base and their domestic water supplies have been contaminated by toxic pollutants from the Base.

Petitioners alleged below that respondent violated the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and California hazardous waste and water laws by storing and discharging hazardous waste at the Base without informing the Environmental Protection Agency (EPA) and the California Department of Health Services of such discharges, and without obtaining permits required by RCRA and the CWA.

Petitioners filed their complaint in 1986. At the time the complaint was filed the Base was not on the CERCLA National Priorities List (NPL) and no CERCLA removal or remedial action had been selected.[1] Petitioners' complaint alleged only that respondent had violated RCRA and the

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[1] On July 27, 1987, more than a year after this case was filed, EPA listed the Base on the NPL. 52 Fed. Reg. 27,620, 27,641 (1987). On May 2, 1990, more than four years after this case was filed, EPA, respondent, and the state signed an Interagency Agreement (IAG) for cleanup of some of the hazardous waste at the Base. Under the IAG, respondent is primarily responsible for the cleanup while EPA and the state "have important advisory and oversight roles." The document that describes how cleanup will be accomplished at the Base is the Management Action Plan (MAP), which was not formally adopted until July, 1993, after this case had already been appealed and submitted for decision to the Ninth Circuit.

CWA, and sought relief only under those two statutes. At no time have petitioners sought an injunction against CERCLA remedial action at the Base. The district court for the most part rejected petitioners' RCRA and CWA claims, and petitioners appealed to the Ninth Circuit.

On appeal respondent argued for the first time that § 113(h) of CERCLA barred the court from hearing petitioners' claims. Section 113(h) of CERCLA bars challenges to EPA approved remedial actions prior to completion of those actions. *See* 42 U.S.C. § 9613(h). Respondent argued that although petitioners' complaint did not refer to or seek to enjoin respondent's remedial actions, if petitioners prevailed on their CWA and RCRA claims those claims might "affect" respondent's remedial actions and petitioners' claims therefore constituted a "challenge" to respondent's remedial actions within the meaning of § 113(h) of CERCLA.[2]

The case was argued on November 3, 1992. On July 8, 1993, the Ninth Circuit issued an order remanding the case to the district court with instructions to decide in the first instance whether § 113(h) precludes review of petitioners' RCRA and CWA claims.

After oral argument in the Ninth Circuit but before remand, the Tenth Circuit held, in *United States v.*

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[2] Respondent raised this issue for the first time in its response brief on appeal and at that time relied on four opinions interpreting § 113(h): *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1018-1024 (3d Cir. 1991); *Werlein v. United States*, 746 F. Supp. 887, 894 (D. Minn. 1990); *United States v. State of Colorado*, 22 ELR 20,008 (D. Colo. 1991), *rev'd*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 922 (1994); and *Reynolds v. Lujan*, Civ. No. 90-902, 1992 WL 39789 (D.N.M. Jan. 15, 1992).

Colorado, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 922 (1994), that § 113(h) of CERCLA does not bar actions to enforce RCRA at facilities with approved CERCLA remedial plans. The Eighth Circuit then decided, in *Arkansas Peace Center v. Arkansas Dept. of Pollution Control*, 999 F.2d 1212 (8th Cir. 1993), *cert. denied*, ___ U.S. __, 113 S. Ct. 1397 (1994), that § 113(h) of CERCLA *does* bar efforts to enforce environmental laws at facilities with approved CERCLA remedial plans.

On October 28, 1993, the district court in this case found that § 113(h) of CERCLA deprived the court of jurisdiction to consider petitioners' RCRA and CWA claims, at least to the extent that those claims applied to "inactive" waste sites at the Base.[3] The court found, however, that § 113(h) did not deprive the court of jurisdiction over RCRA claims involving ongoing hazardous waste storage and disposal operations at the Base. The case then returned to the Ninth Circuit.

On January 30, 1995, the Ninth Circuit affirmed the district court, holding that petitioners' RCRA, CWA, and state water quality law claims constitute "challenges" to respondent's CERCLA remedial actions. The court concluded that ordering respondent to comply with the

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[3] On remand, respondent submitted two declarations from Mario Ierardi, Chief, Environmental Restoration Division of the Environmental Management Directorate, McClellan Air Force Base. Mr. Ierardi stated that compliance with the notification and permitting requirements "would waste the time and resources" of the Air Force. Second declaration of Ierardi at 3, 4, 7. Mr. Ierardi also hypothesized that if respondent complied with the notification and permitting requirements of RCRA and the CWA, EPA or the state might decide to deny a permit or halt CERCLA cleanup operations, or order cleanup actions that conflict with the CERCLA plan. Second declaration of Ierardi at 4, 7, 8.

reporting and permitting requirements of RCRA and the CWA would lead to "[t]he injection of new requirements for dealing with the inactive sites that are now subject to the CERCLA cleanup," and the court was unable "to fashion any remedy that would not interfere with McClellan's CERCLA groundwater extraction system." App. at 15, 17 (*McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330-31 (9th Cir. 1995)).

JURISDICTION IN THE DISTRICT COURT

The district court had subject matter jurisdiction over this matter pursuant to the citizens' suit provisions of RCRA, 42 U.S.C. § 6972(a), and the CWA, 33 U.S.C. § 1365; under the federal question statute, 28 U.S.C. § 1331, and under 28 U.S.C. § 1367, providing supplemental jurisdiction over petitioners' state law claims involving the "same case or controversy" as the federal claims.

INTRODUCTION

There is a disagreement among the various Circuits of the United States Court of Appeals over whether § 113(h) of CERCLA bars enforcement of environmental laws at sites engaged in CERCLA remedial actions. This Court has been asked on three prior occasions to review this issue; one of these requests came from the Solicitor General.[4]

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[4] *See Arkansas Peace Center v. Arkansas Dept. of Pollution Control*, 999 F.2d 1212 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1397 (1994); *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 922 (1994); *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990).

The Ninth Circuit in the instant case, the Third Circuit in *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991), the Seventh Circuit in *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990), and the Eighth Circuit in *Arkansas Peace Center v. Arkansas Dept. of Pollution Control*, 999 F.2d 1212 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1397 (1994), all held that § 113(h) of CERCLA bars efforts to enforce environmental laws at facilities with approved CERCLA remedial plans. *See* App. at 15-18 (*McClellan Ecological Seepage Situation*, 47 F.3d at 330-31); *Boarhead Corp.*, 923 F.2d at 1018-1024; *Schalk v. Reilly*, 900 F.2d at 1095; *Arkansas Peace Center*, 999 F.2d at 1217-18.[5]

In *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 922 (1994), however, the Tenth Circuit found that § 113(h) of CERCLA does *not* bar the enforcement of RCRA at sites engaged in remedial actions under CERCLA, and concluded:

> While *CERCLA* citizen suits cannot be brought prior to the completion of a CERCLA remedial action . . . *RCRA* citizen suits to enforce [RCRA's] provisions at a site in which a CERCLA response action is underway can be brought prior to the completion of the CERCLA response action.

990 F.2d at 1577 (emphasis added). The First and Second Circuits also have rejected arguments that § 113(h) of CERCLA bars litigation that might affect a site engaged in CERCLA remedial action. *See In re Chateaugay Corp.*,

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[5] In holding that petitioners' claims were barred by § 113(h), the Ninth Circuit relied upon *Arkansas Peace Center* and *Boarhead*.

944 F.2d 997, 1006 (2nd Cir. 1991) (in the context of a challenge to a CERCLA-based property lien "CERCLA's prohibition of pre-enforcement review is simply inapplicable. The Court is not being called upon to 'review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title.' "); *Reardon v. United States*, 947 F.2d 1509, 1513, 1515 (1st Cir. 1991) (hearing constitutional challenge to EPA's lien authority under CERCLA would not impair underlying purposes of § 9613(h)).

In addition to the disagreement among the Circuits over the proper interpretation of § 113(h) of CERCLA, this case presents an important question of federal law that has not previously been addressed by this Court. If the Ninth Circuit's opinion in this case is allowed to stand, sites that are by definition some of the worst hazardous waste facilities in the country will be immune to enforcement of environmental laws once they adopt a CERCLA cleanup plan. It is clear that Congress did not intend such a result. Rather, Congress expected CERCLA, RCRA, and other environmental statutes to work in conjunction.[6] *See* 42 U.S.C. § 9652(d) ("nothing in CERCLA shall affect or modify existing laws with respect to hazardous substances"); *see also* 42 U.S.C. § 6961 (federal agencies must comply with the substantive and procedural requirements of RCRA to the same extent as any

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[6] EPA "has a number of options for harmonizing operation of RCRA and CERCLA," in order to avoid "duplicative orders and overlaps." App. at 201 (EPA memorandum of Lisa Friedman).

other person); 33 U.S.C. § 1323 (same, with respect to the CWA).

ARGUMENT

I. THE NINTH, THIRD, SEVENTH, AND EIGHTH CIRCUITS' OPINIONS ADDRESSING § 113(h) OF CERCLA CONFLICT WITH THE FIRST, SECOND, AND TENTH CIRCUITS' OPINIONS ADDRESSING § 113(h) OF CERCLA

The Ninth Circuit's conclusion that § 113(h) of CERCLA bars enforcement of RCRA and the CWA in this case, and similar conclusions by the Third Circuit in *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991), the Seventh Circuit in *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990), *cert. denied*, 498 U.S. 981, and the Eighth Circuit in *Arkansas Peace Center v. Arkansas Dept. of Pollution Control*, 999 F.2d 1212 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1397 (1994), conflict with the Tenth Circuit's conclusion in *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 922 (1994) that § 113(h) does *not* bar RCRA enforcement actions at CERCLA remedial sites. The Ninth, Third, Seventh, and Eighth Circuit opinions also conflict with the First Circuit's opinion in *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) and the Second Circuit's similar opinion in *In re Chateaugay Corp.*, 944 F.2d 997 (2nd Cir. 1991), both holding that § 113(h) does not bar challenges to EPA liens even if the challenges affect CERCLA remedial actions.

In *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 922 (1994), the Tenth Circuit held that Colorado's efforts to enforce a final compliance order issued through the state's EPA-delegated RCRA authority against a hazardous waste site

involved in a CERCLA cleanup (the Rocky Mountain Arsenal) was not a "challenge" to the cleanup within the meaning of § 113(h). 990 F.2d at 1576. Noting that Congress intended CERCLA to work in conjunction with other environmental statutes, the Tenth Circuit concluded that "to hold otherwise would require us . . . to find that CERCLA implicitly repealed RCRA's enforcement provisions contrary to Congress' expressed intention." 990 F.2d at 1575. Although the lawsuit at issue in *Colorado* was presented by a state rather than by citizens, the Tenth Circuit expressly stated that the government's interpretation of § 113(h) "is also inconsistent with RCRA's citizen suit provision." 990 F.2d at 1577.[7]

The First and Second Circuits also rejected arguments that § 113(h) bars all claims that could in some way affect a CERCLA cleanup. In *In re Chateaugay Corp.*, 944 F.2d 997 (2nd Cir. 1991), EPA argued that § 113(h) barred plaintiffs' claim because if plaintiffs prevailed EPA "would be forced to litigate in the bankruptcy proceedings to liquidate and fix any claims it might conceivably have against [plaintiffs] for post-confirmation response costs" and even trying to estimate the claims would "embroil the parties and the bankruptcy court in disputes over the

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[7] The court noted some citizen suits *are* explicitly barred by § 113(h) – CERCLA citizen suits and RCRA "imminent hazard" suits – but that the type of RCRA suit brought by petitioners in the instant case are *not* barred by section 113(h). *United States v. Colorado*, 990 F.2d at 1577-78. The Ninth Circuit in the instant case inexplicably failed even to mention *United States v. Colorado*, despite the fact that the *Colorado* opinion directly supports petitioners' argument, was extensively briefed to the Ninth Circuit, in this case, and directly contradicts the Ninth Circuit's opinion.

wisdom and scope of possible remedies." 944 F.2d at 1006.

The Second Circuit rejected this argument and held that "CERCLA's prohibition of pre-enforcement review is simply inapplicable. The Court is not being called upon to 'review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title.' " *Id.*

In *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991), the First Circuit rejected a similar argument. In *Reardon*, landowners brought an action challenging a lien filed against their property by the EPA pursuant to CERCLA. Although the First Circuit held that some of the claims were barred by § 113(h), it held that the plaintiffs' constitutional due process claim was not barred. The court held that § 113(h) divests federal courts of jurisdiction only "over challenges to EPA's administration of the statute – claims that EPA did not 'select[ ]' the proper 'removal or remedial action.' " 947 F.2d at 1514. The plaintiffs' due process claim was not barred by § 113(h) because it did not challenge the way in which EPA administers the statute and did not "concern the merits of any particular removal or remedial action," but rather was a constitutional challenge to CERCLA itself. *Id.*[8]

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[8] *See also Chemical Waste Management, Inc. v. EPA*, 673 F. Supp. 1043 (D. Kan. 1987) (suit challenging EPA's CERCLA procedures was not barred by § 113(h)); *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705 (D. Ariz. 1993) (suit to recover medical monitoring costs not barred by § 113(h)).

As the *Yslava* court recognized:

> Even assuming medical monitoring programs qualify as removal or remedial action, the jurisdictional bar of § 9613(h) still does not preclude this

Despite these opinions from the First, Second, and Tenth Circuits, the Third, Seventh, and Eighth Circuits, like the Ninth Circuit, have adopted a broad interpretation of § 113(h) of CERCLA that precludes enforcement of non-CERCLA laws at CERCLA remedial action sites. In *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991), the owner of a CERCLA site sued under the National Historic Preservation Act to halt the destruction of archaeological artifacts through soil cleanup at his property. The Third Circuit held that § 113(h) barred the claim, and that Congress had balanced the importance of cleaning up hazardous waste against the need to preserve archaeological artifacts and had tipped the balance in favor of cleanup. 923 F.2d at 1013, 1018-19.

In *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990), *cert. denied*, 498 U.S. 981, citizens sued EPA under the National Environmental Policy Act (NEPA) because EPA failed to prepare an Environmental Impact Statement (EIS) for a CERCLA cleanup. The Seventh Circuit held that the suit was barred by § 113(h). 900 F.2d at 1095.

In *Arkansas Peace Center*, citizens attempted to enforce RCRA provisions at a CERCLA site. Although the district

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> Court's jurisdiction. . . . Plaintiffs' state law medical monitoring claims in no way challenge a response action.

845 F. Supp. at 709. The *Yslava* court thus held that suits seeking remedies unrelated to issues of liability for cleanup costs are not challenges to 'removal or remedial action' and thus § 9613(h) does not apply. The underlying structure and purpose of CERCLA supports this conclusion. Given the purposes of CERCLA, § 9613(h) only properly precludes jurisdiction in actions where a potentially responsible party seeks to litigate either the existence or extent of liability for response costs. 845 F. Supp. at 711.

court enjoined incineration of dioxin-laden wastes on the site because it clearly violated EPA's regulations, the Eighth Circuit held that § 113(h) barred the suit and overturned the injunction. 999 F.2d at 1215. The Eighth Circuit attempted to distinguish *United States v. Colorado* by asserting that "[t]he Tenth Circuit [in *Colorado*] limited its holding to an action brought by a state." *Arkansas Peace Center*, 999 F.2d at 1218. But the Tenth Circuit in *Colorado* made no distinction between state enforcement and private enforcement. In fact, the *Colorado* court specifically held:

> While CERCLA citizen suits cannot be brought prior to the completion of a CERCLA remedial action . . . RCRA citizen suits to enforce [RCRA's] provisions at a site in which a CERCLA response action is underway *can* be brought prior to the completion of the CERCLA response action.

United States v. Colorado, 990 F.2d at 1577 (emphasis added). The Eighth Circuit's opinion also ignores the Tenth Circuit's explicit finding that "Congress clearly intended that a CERCLA response action would not prohibit a RCRA citizen enforcement suit. . . . Congress did not intend a CERCLA response action to bar a RCRA enforcement action *or* an equivalent action by a state." *United States v. Colorado*, 990 F.2d at 1578 (emphasis added).[9]

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[9] This case is, of course, a RCRA enforcement action and thus falls squarely within the *Colorado* holding. The Tenth Circuit noted that "RCRA itself expressly prohibits imminent hazard suits by citizens where the EPA is engaged in CERCLA removal actions, . . . while *not* expressly so prohibiting citizen enforcement suits." *United States v. Colorado*, 990 F.2d at 1578 (emphasis added).

When a party claims that a particular statute precludes judicial review, courts look to not only the statute's express language, but also "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345, 104 S. Ct. 2450, 2453-54 (1984). The reasoning of the First, Second, and Tenth Circuits properly interpret the scope of § 113(h) in light of the "structure of the statutory scheme, its objectives, [and] its legislative history." The opinions of the Ninth, Third, Seventh, and Eighth Circuits do not attempt to reconcile their results with the structure and objectives of CERCLA. Petitioners respectfully request that this Court issue a writ of certiorari to resolve a disagreement among the Circuits and to decide whether the Ninth, Third, Seventh, and Eighth Circuits' interpretation of § 113(h) is correct, or whether the First, Second, and Tenth Circuits' interpretation of § 113(h) is correct.

II. THIS CASE INVOLVES AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT YET BEEN ADDRESSED, BUT SHOULD BE ADDRESSED, BY THIS COURT

CERCLA was adopted to address the worst hazardous waste sites in the United States. *See* 42 U.S.C. §§ 9605(a) (establishing "national contingency plan for the removal of . . . hazardous substances"); 9604(a)(1) (providing for hazardous waste removal and remedial action consistent with the national contingency plan). RCRA and the CWA also apply to activities at these sites. *See* 42 U.S.C. § 6924(a) (RCRA requires EPA to establish

performance standards applicable to owners and operators of hazardous waste treatment, storage and disposal sites); 33 U.S.C. § 1311(a) (prohibiting "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit).[10] RCRA, the CWA, and California hazardous waste and water quality laws all require notification and permitting when hazardous substances are released into the environment. *See, e.g.*, 42 U.S.C. § 6930(a); 40 C.F.R. § 270.13(h); Calif. Water Code, Div. 7, Ch. 4, Art. 4 § 13260(c). Federal facilities are subject to all requirements respecting the control and abatement of hazardous waste or water pollution. 42 U.S.C. § 6961 (RCRA); 33 U.S.C. § 1323 (CWA).

The interrelationship between CERCLA, RCRA, the CWA, and other environmental statutes has caused considerable confusion in the lower courts, particularly with respect to the effect of § 113(h) of CERCLA on the application of RCRA and the CWA at hazardous waste sites engaged in remedial actions. The Ninth Circuit's opinion in this case, for example, ignores the statutory citizen suit language in RCRA and the CWA authorizing citizens such as petitioners to prosecute cases such as this. 42 U.S.C. § 6972(a) (citizens' suit provisions of RCRA); 33 U.S.C. § 1365 (citizens' suit provisions of CWA). The Ninth Circuit's opinion also ignores the specific savings provision in CERCLA stating that Congress did *not* intend to repeal other laws regulating toxic waste. *See* 42 U.S.C. § 9652(d) ("nothing in CERCLA shall affect or

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[10] EPA has noted that "the great majority of Federal facility sites that could be placed on the NPL have RCRA-regulated hazardous waste management units within the Federal facility property boundaries." 54 Fed. Reg. 10,520, 10,521 (1989).

modify existing laws with respect to hazardous substances."); *see also* 42 U.S.C. § 6961 (federal agencies must comply with the substantive and procedural requirements of RCRA to the same extent as any other person); 33 U.S.C. § 1323 (same, with respect to CWA).

The *only* Circuit to address the relationship between § 302(d) of CERCLA (the savings clause), § 113(h) of CERCLA, and the statutory authorization of citizen suits in RCRA, concluded that Congress did *not* intend to impliedly repeal the citizen suit provision of RCRA when it adopted § 113(h) of CERCLA. *See United States v. Colorado, supra,* 990 F.2d at 1575. The Ninth Circuit in this case, and other Circuits that have addressed § 113(h), simply failed to analyze the relationship between § 113(h) of CERCLA, § 302(d) of CERCLA, and the citizen suit provisions of other laws, such as RCRA and the CWA.

A. CERCLA Was Not Intended to Preempt Other Pollution Control Statutes

Congress explicitly provided that CERCLA was not intended to preempt other environmental laws. *See* CERCLA § 302(d), 42 U.S.C. § 9652(d) ("nothing in CERCLA shall affect or modify existing laws with respect to hazardous substances"). The practical result of the Ninth Circuit's opinion, however, is to "affect or modify" the citizen suit provisions of RCRA and the CWA by making those provisions inapplicable at CERCLA sites engaged in remedial action.

As this Court stated in *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140, 87 S. Ct. 1507, 1511 (1967), even in the absence of a savings clause there is a presumption that Congress does not intend to prohibit judicial review "unless there is persuasive reason to believe that such

was the purpose of Congress." And as the Court has also stated:

> Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.

Block v. Community Nutrition Inst., 467 U.S. 340, 345, 104 S. Ct. 2450, 2453-54 (1984).[11]

The plain language and legislative history of CERCLA demonstrate that, far from intending that § 113(h) impliedly repeal the citizen enforcement provisions of RCRA and the CWA, Congress intended to preserve the citizen suit provisions of RCRA and the CWA. Section 113(h) was intended only to limit challenges by potentially responsible parties seeking to reduce their financial liability by interfering with ongoing cleanup efforts through litigation. The Ninth Circuits' opinion expanding § 113(h) beyond this limited purpose runs

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[11] Courts must give effect if possible to apparently competing statutes, "absent clearly expressed congressional intent[] to the contrary." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 112 S. Ct. 683, 692 (1992) ("Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is [our] duty . . . absent clearly expressed congressional intention to the contrary, to regard each as effective."). Even when a later enacted statute is not entirely harmonious with an earlier one, courts are reluctant to find repeal by implication unless the text or legislative history of the later statute shows that Congress intended to repeal the earlier statute and simply failed to do so expressly. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 470, 102 S. Ct. 1883, 1892 (1982) ("an implied repeal must ordinarily be evident from the language or operation of the statute").

afoul of the rule against implied repeal of statutory provision for judicial review.

1. The Ninth Circuit Improperly Ignored The Express Savings Provisions of CERCLA

Congress explicitly preserved the application of other statutes in § 302(d) of CERCLA, 42 U.S.C. § 9652(d). Section 302(d) states:

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. § 9652(d). Both RCRA and the CWA were in existence when CERCLA was adopted, and plainly qualify as federal law "with respect to releases of hazardous substances or other pollutants or contaminants."

Congress added an additional savings clause to CERCLA to ensure that federal facilities such as the respondent in this case do not evade RCRA responsibilities. This clause states:

> Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [RCRA, 42 U.S.C. § 6901 et seq.] (including corrective action requirements).

42 U.S.C. § 9620(i).

The Ninth Circuit's conclusion that CERCLA § 113(h) precludes the enforcement of RCRA and the CWA due to ongoing CERCLA removal and remedial activities would eviscerate the explicit statements in §§ 302(d) and 120(i) of CERCLA that RCRA, the CWA and other pollution

laws continue to apply at CERCLA sites, and particularly at federal facility CERCLA sites.

That Congress did not intend to preclude citizen enforcement actions at CERCLA sites engaged in remedial actions is also demonstrated by the fact that Congress *did* consider and explicitly limited RCRA's reach at CERCLA sites under circumstances not present in this case. RCRA provides two separate citizen causes of action. The first, "citizen enforcement suits," allow any person to sue any other person, "alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order" pursuant to RCRA. 42 U.S.C. § 6972(a)(1)(A). The second, "imminent and substantial endangerment" suits, allow any person to sue any other person to abate an "imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

Petitioners' action is a citizen enforcement suit under 42 U.S.C. § 6972(a)(1)(A), and not an "imminent and substantial endangerment suit under 42 U.S.C. § 6972(a)(1)(B). Because Congress was concerned that imminent and substantial endangerment suits would involve courts in remedial actions under CERCLA, it *expressly* provided in RCRA that imminent and substantial endangerment actions are precluded at sites where remedial or removal actions under CERCLA §§ 104 or 106 are proceeding. 42 U.S.C. § 6972(b)(2)(B). If Congress had intended to preclude RCRA citizen *enforcement* suits (as opposed to imminent and substantial endangerment suits) during a CERCLA remedial action, it would have specifically said so in RCRA's citizen enforcement provision. Instead, Congress carefully limited its preclusion to the imminent endangerment section and left the citizen

enforcement provisions of RCRA available for enforcement actions at sites engaged in CERCLA remediation. *See United States v. Colorado*, 990 F.2d at 1578 (holding that substantial endangerment suits are barred during CERCLA cleanup, while enforcement suits such as the instant suit are not).

If Congress had intended to preclude RCRA or CWA citizen enforcement suits during a CERCLA remedial action, the logical place to do so would have been the citizen enforcement provisions of the RCRA and CWA. Since the enactment of CERCLA in 1980, Congress has had the opportunity to amend RCRA, the CWA, and CERCLA and has chosen not to repeal the statutory provisions for citizen enforcement of RCRA and the CWA.

2. The legislative history of CERCLA indicates that Congress did not intend § 113(h) to impliedly repeal the citizen suit provisions of RCRA and the CWA

The Ninth Circuit refused to address the legislative history of § 113(h), stating:

> Because the statutory language is so clear, MESS must overcome a strong presumption that the plain language of the statute expresses Congress' intent. See *Ardestani v. INS*, 502 U.S. 129, 135-37, 112 S. Ct. 515, 520, 116 L.Ed.2d 496 (1991). For MESS's purposes, the legislative history of Section 113(h) is, at best, unclear.

App. at 11 n.4 (47 F.3d at 329 n.4). But determining what constitutes a "challenge" for purposes of § 113(h) *requires* the court to look at the legislative history, particularly in light of this Court's admonition in *Abbott Laboratories* that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict

access to judicial review." 387 U.S. at 141, 87 S. Ct. at 1511 (citing *Rusk v. Cort*, 369 U.S. 367, 379-380, 82 S. Ct. 787, 794 (1962)).[12]

Congress intended CERCLA's first priority to be the swift cleanup of hazardous waste sites. Determining financial responsibility for cleanup was deliberately given a lower priority than actually accomplishing the cleanup. *See Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991) ("Congress concluded that disputes about who is responsible for a hazardous site . . . or . . . for its costs should be dealt with after the site has been cleaned up").

Congress' purpose in enacting § 113(h) was "to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities." H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 266 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2941 (section-by-section analysis in Energy and Commerce Committee Report). In fact, the proponents of § 113(h) of CERCLA explicitly stated that § 113(h) was intended to codify the case law which had interpreted CERCLA to bar pre-enforcement review of claims by responsible parties. *See* Superfund Reauthorization: Judicial and Legal Issues: Hearings on H.R. 2817 Before the Subcomm. on Admin.

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[12] Even in cases that do not involve the potential preclusion of judicial review, when courts engage in any statutory construction they must look not only to the language of the statute but also to the design of the statute as a whole and to its object and policy. *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 1001 (1990); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 112 S. Ct. 570, 574 (1991) (statute must be read as a whole because "meaning, plain or not, depends on context").

Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 1st Sess., House of Representatives 57 (1985) (statement of F. Henry Habicht II, U.S. Ass't Att'y Gen., Dept. of Justice, Land & Natural Resources Div.) (giving section-by-section explanation of amendments and stating: "Our proposed amendment to CERCLA [§ 113(h)] would simply codify these holdings and ensure that court challenges would not delay cleanups.") *See, Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315 (2d Cir. 1986) (CERCLA responsible party may not bring pre-enforcement challenge); *Wheaton Indus. v. EPA*, 781 F.2d 354, 356-57 (3d Cir. 1986) (same); *United States v. Outboard Marine Corp.*, 789 F.2d 497, 505-06 (7th Cir.), *cert. denied*, 479 U.S. 961, 107 S. Ct. 457 (1986) (same); *Barnes v. United States District Court*, 800 F.2d 822, 822 (9th Cir. 1986) (same); *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264-65 (6th Cir. 1985) (same).

There is absolutely no indication in the legislative history of CERCLA that Congress intended § 113(h) to preclude enforcement actions specifically authorized by RCRA and the CWA. Congress *did* clearly state, however, that it intended courts to distinguish "between . . . lawsuits by potentially responsible parties involving only monetary damages and legitimate citizens' suits complaining of irreparable injury that can be addressed only if a claim is heard during or prior to response action." 132 Cong. Rec. S14898 (daily ed. Oct. 3, 1986) (comment of Sen. Stafford). *See also* 132 Cong. Rec. H9600 (daily ed. Oct. 8, 1986) (comment of Rep. Roe) (same).[13]

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[13] The district court relied primarily upon a statement made by Senator Thurmond during floor debate. App. at 183-85 (*McClellan Ecological Seepage Situation (MESS) v. Aspin*,

The fact that Congress envisioned citizen suits being filed under CERCLA itself strongly suggests that Congress did

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unpublished "Findings and Determination Re: Jurisdiction" on remand, Civ. No. S-86-475-WBS (E.D. Calif., Oct. 28, 1993), at 15-16 (§ 113(h) "covers all issues that could be construed as a challenge to the response")). That statement, however, is much broader in its reach than the plain wording of the statute and than any of the statements made in Committee reports or by other members of Congress.

The views expressed by Senators Stafford and Roe, that § 113(h) is aimed at lawsuits brought by potentially responsible parties in order to delay CERCLA cleanup, were echoed repeatedly throughout the legislative history of the CERCLA amendments. *See* 132 Cong. Rec. H9600 (daily ed. Oct. 8, 1986, comment of Rep. Roe); 132 Cong. Rec. S14814, 14814 (Oct. 3, 1986, comment of Sen. Mitchell) ("The conferees agreed that some preimplementation review would be provided so that citizens would not be disadvantaged by having to wait until cleanup was complete."); H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 266 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2941; 132 Cong. Rec. S14898 (daily ed. Oct. 3, 1986) (citizens must be allowed to sue "before such plans are implemented because otherwise the agency could proceed in blatant violation of the law and waste millions of dollars of Superfund money before a court had considered the illegality.") (comment of Sen. Stafford).

Senator Stafford, who chaired the Committee on Environment and Public Works during its extensive hearings on the Superfund amendments, also coordinated the conference committee process and gave the section-by-section analysis in the Conference Report to accompany H.R. 2005. 132 Cong. Rec. S14895, S14895, 99th Cong., 2d Sess. (1986). In Senator Chafee's words:

> Our chairman [Sen. Stafford] worked long and hard for this legislation. Despite innumerable obstacles, he never gave up hope or slackened in his tireless efforts to achieve the goal of a new, improved Superfund. For months and months, the conference meetings went on and on. At each and every meeting

not intend CERCLA to *preclude* suits under other independent statutes. *See* 42 U.S.C. § 9659.

Because potentially responsible parties can be made financially whole by litigating *after* the completion of the cleanup, Congress intended § 113 primarily to bar suits by such parties seeking to interfere with cleanup activities in order to avoid or reduce future liability. Congress did *not*, however, intend to bar enforcement actions against ongoing violations of RCRA or the CWA until *after* CERCLA cleanup is completed, which in this case will not occur until some time in the 21st century, if ever.

In *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 922 (1994), the Tenth Circuit found that Congress intended CERCLA to work together with other statutes and that CERCLA § 113(h) does not impliedly repeal RCRA enforcement provisions. This Court should grant a writ of certiorari to reverse the Ninth Circuit's opposite conclusion.

B. EPA Recognizes that RCRA Enforcement Actions at Sites Engaged in Remedial Action under CERCLA Are Not Precluded by § 113(h)

EPA has given considerable attention to the possibility of overlap between RCRA and CERCLA and has stated that such overlap was intended by Congress and will *not* interfere with CERCLA response actions.

> EPA recognizes that when it takes action under CERCLA to address a facility that is also subject

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– small private sessions or large public meetings – he was there.

132 Cong. Rec. S14895, S14924, 99th Cong., 2d Sess. (1986). Senator Stanford's statements with request to § 113(h) plainly should be given significant weight.

> to RCRA authorities, there is some risk of overlap. . . . However, this potential overlap . . . is the result of Congressional design, not site listings. . . . The questions of which authority should control, and of how to avoid potential duplication or inconsistency, are . . . to be resolved in light of the facts of the case and after consultation between EPA and the concerned State.

54 Fed. Reg. 10,520, 10,522-23 (1989). *See also* 54 Fed. Reg. 41,000, 41,007 (1989) ("RCRA authorities may be used by themselves or in conjunction with CERCLA removal and enforcement authorities"); 55 Fed. Reg. 8,696 (1990) (EPA "has the discretion to use its authorities under CERCLA, RCRA, or both to accomplish appropriate cleanup action at a site, even where the site is listed on the NPL").

Obviously, EPA does not view RCRA enforcement actions as inherently incompatible with CERCLA cleanup actions. To minimize any overlap between RCRA and CERCLA, EPA has identified "a number of options for harmonizing operation of the two authorities and avoiding duplicative orders and overlaps." App. at 201 (Friedman memo). EPA notes that "[s]uch conflict situations are not a problem where EPA is responsible for carrying out the requirements of both RCRA and CERCLA (since any jurisdictional overlaps can be managed within EPA)." 54 Fed. Reg. 10,520, 10,522 (1989).

There will be no conflict between EPA issued RCRA and CWA permits and ongoing cleanup activities at the Base because "EPA is responsible for carrying out the requirements of both RCRA and CERCLA [and] . . . any jurisdictional overlaps can be managed within EPA[]." *Id.*

When the Department of Energy asked EPA: "Does CERCLA section 121(e)(1) relieve DOE from the requirement to apply for [RCRA] post-closure permits at NPL sites?" EPA answered: "No; CERCLA does not relieve DOE from the requirement to obtain [RCRA] post-closure permits for pre-existing, RCRA-regulated units at NPL sites." (App. at 199 (Friedman memo)), EPA noted that § 113(h) does not bar the enforcement of "RCRA orders or permits that do not conflict with the CERCLA-selected remedy." App. at 200 (Friedman memo). "[I]t is clear," EPA concluded, "that the simple issuance of an FFA [Interagency Agreement] . . . does not, without more, act to preempt the effect of permits required under RCRA . . . for non-CERCLA activities." App. at 205 (Friedman memo).

The Ninth Circuit's opinion in this case ignored the extensive consideration given by EPA to the relationship between RCRA permit requirements and CERCLA cleanup activities. In particular, the Ninth Circuit took it upon itself to determine that RCRA permitting requirements would detract from cleanup efforts at the Base, despite the fact that such a determination is plainly the province of EPA, not the courts. Under the Ninth Circuit's interpretation of § 113(h), every time a CERCLA removal and remedial action begins at a new site, that site becomes immunized from the permitting and enforcement provisions of pollution prevention statutes such as RCRA and the CWA. As even the Ninth Circuit acknowledged, such immunization could last for decades, or sometimes forever. *See* App. at 13 (47 F.3d at 329) (because cleanup at the Base will last at least several decades, "[w]e recognize that the application of Section 113(h) may in some cases delay judicial review for years,

if not permanently."). This result is plainly inconsistent with EPA's views of the proper interaction of CERCLA and RCRA.

C. The Fact That Complying with RCRA and the CWA Would Require the Expenditure of Resources Does Not Make This Case a Challenge to the Cleanup Plan

The Ninth Circuit apparently accepted respondent's argument that the "additional study, documentation and substantiation" that would be required to comply with the notification and permitting requirements of RCRA and the CWA "could delay the ongoing cleanup activities while resources were redirected toward the application effort." *See* App. at 187 n.7 (Unpublished "Findings and Determination Re: Jurisdiction," Civ. No. S-86-475-WBS (E.D. Calif., Oct. 28, 1993), at 19 n.7). The district court found that such costs made this case a "challenge" to the cleanup plan, and the Ninth Circuit, while not explicitly basing its holding on the costs of compliance, stated:

> The injection of new requirements for dealing with the inactive sites that are now subject to the CERCLA cleanup (or McClellan's defense against imposition of such requirements) would clearly interfere with the cleanup.
>
> It is true, as MESS argues, that every action that increases the cost of a cleanup or diverts resources or personnel from it does not thereby become a "challenge" to the cleanup. The enforcement of minimum wage requirements, for example, might increase the cost of a cleanup and even divert personnel from cleanup duties without becoming a challenge to the cleanup. MESS's lawsuit, however, is far more directly related to the goals of the cleanup itself

> than is the hypothetical minimum wage action. MESS, for all practical purposes, seeks to improve on the CERCLA cleanup as embodied in the Interagency Agreement. Its action qualifies as a "challenge" to the cleanup.

App. at 15 (47 F.3d at 330). The court's acceptance of this argument is puzzling. There is no principled way to draw a line between spending resources to comply with environmental laws and spending resources to do anything else. Allowing a CERCLA site to argue that it cannot comply with non-CERCLA environmental laws because to do so would divert resources from a CERCLA cleanup effort would exempt every CERCLA site from all non-CERCLA laws.

The fact that compliance with RCRA may require expending additional resources is no defense to the law. EPA's Office of General Counsel (OGC) properly rejected the "cost" argument when it was raised by the Department of Energy. *See* App. at 199-200 (Friedman memo). Hazardous waste operators are strictly liable for RCRA violations. *See United States v. Allegan Finishing Co.*, 696 F. Supp. 275, 287 (W.D. Mich. 1988); *United States v. Liviola*, 605 F. Supp. 96, 100 (N.D. Ohio 1985). This is because "[e]conomic loss to polluters is far outweighed by the benefit to the community from enjoining of [polluting] activities." *United States v. Ciampitti*, 583 F. Supp. 483, 499 (D.N.J. 1984). *See also EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 101 S. Ct. 295, 304 (1980) (Clean Water Act imposes "additional costs which must be borne or the point source eliminated"); *United States v. T & S Brass and Bronze Works, Inc.*, 681 F. Supp. 314, 321 (D.S.C. 1988), *aff'd in part, rev'd in part on other grounds*, 865 F.2d 1261 (4th Cir. 1988) ("Compliance with the statutory deadline was mandatory, even if the defendant[s'] only option was

to cease its business. . . . Congress had already determined that protection of the public health and the environment was paramount"); *American Lung Ass'n v. Kean*, 1987 U.S. Dist. LEXIS 15158, *14-15, 26 ERC 1865, 18 Envtl. L. Rep. 20,317 (D.N.J., Civ. No. 87-288, Nov. 19, 1987), *aff'd*, 871 F.2d 319 (3d Cir. 1989) ("It is perhaps understandable that intervenor-defendants wish to avoid the costs of . . . compliance, but the law . . . will not allow [them] to hide behind those costs"); *Public Interest Research Group of New Jersey, Inc. v. Top Notch Metal Finishing Co.*, 1987 U.S. Dist. LEXIS 15163, *14, 26 ERC 2012 (D.N.J., Civ. No. 87-3894, Nov. 6, 1987) ("[I]f to stay in business Top Notch must expend a large sum of money to come into immediate compliance with toxic substance limitations, that is a balance Congress has struck in favor of the environment").

D. The Fact That EPA and California Will Have Additional Regulatory Authority at the Base If Respondent Complies With RCRA and the CWA Does Not Make This Case a Challenge to the Cleanup Plan

The Ninth Circuit also accepted respondent's argument that this case challenges the cleanup because notification and permitting under RCRA, the CWA, and state water quality laws *might* lead to "[t]he injection of new requirements for dealing with the inactive sites that are now subject to the CERCLA cleanup (or McClellan's defense against imposition of such requirements)." App. at 15 (47 F.3d at 330). Specifically, in regards to the discharges to groundwater and surface water, the Ninth Circuit held that requiring respondent to provide proper notification to the state, EPA, and the public, and to

obtain a CWA discharge permit, might somehow interfere with "the leaching process [which] is a necessary component of the CERCLA plan's groundwater extraction system." App. at 17 (47 F.3d at 330).

The Ninth Circuit assumed that if respondent gave such notification, federal and state regulatory bodies would order respondent to alter its cleanup activities in ways that would interfere with the cleanup. But there is no basis for assuming that EPA or the state of California will order respondent to do something inconsistent with its cleanup. Rather, as discussed, above EPA recognizes the overlap of the statutes and has mechanisms to harmonize. In fact, the Interagency Agreement (IAG) prepared for the Base specifically recognizes that compliance with the notification and permitting requirements of RCRA and the CWA are required independent of the CERCLA cleanup.

CONCLUSION

There is a significant conflict between the various Circuits over the proper interpretation of § 113(h) of CERCLA. The extent to which § 113(h) of CERCLA precludes enforcement of other environmental laws at sites engaged in CERCLA remedial actions is an important question of federal law that has not previously been addressed by this Court. For these reasons, petitioners respectfully request that the Court issue a writ of certiorari to the Ninth Circuit to review the Ninth Circuit's opinion in this case.

Respectfully submitted,

MICHAEL AXLINE
Counsel of Record for Petitioners
MARIANNE DUGAN

Dated this 1st day of May, 1995.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

McCLELLAN ECOLOGICAL SEEPAGE SITUATION; MARY FISHER; CHARLES YARBROUGH, *Plaintiffs-Appellants,* v. WILLIAM J. PERRY,* Secretary of the United States Department of Defense, *Defendant-Appellee.*	No. 91-16308 D.C. No. CV 86-00475-RAR
McCLELLAN ECOLOGICAL SEEPAGE SITUATION; MARY FISHER; CHARLES YARBROUGH, *Plaintiffs-Appellees,* v. WILLIAM J. PERRY,* Secretary of the United States Department of Defense, *Defendant-Appellant.*	No. 91-16467 D.C. No. CV 86-00475-RAR OPINION

* William J. Perry is substituted for his predecessor, Les Aspin, as Secretary of Defense. Fed. R. App. P. 43(c)(1).

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Appeals from the United States District Court
for the Eastern District of California
Raul A. Ramirez, District Judge, Presiding

Argued and Submitted
August 9, 1994 – San Francisco, California

Filed January 30, 1995

Before: Betty B. Fletcher, Arthur L. Alarcon
and William C. Canby, Jr., Circuit Judges.

Opinion by Judge Canby

SUMMARY

**Environmental Law/Hazardous Waste/
Litigation and Procedure**

The court of appeals vacated a judgment of the district court and remanded. The court held that federal courts lack jurisdiction over all contemporaneous challenges to hazardous waste cleanups undertaken pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Since 1979, the Department of Defense (DOD) has taken steps to remediate environmental damage caused by toxic and hazardous waste pollution at McClellan Air Force Base and its environs. The cleanup program is governed by CERCLA and an interagency agreement between the Air Force, the Environmental Protection Agency and the State of California. The agreement's Management Action Plan (MAP) incorporates the requirements of the Resource Conservation Recovery Act (RCRA), the Clean Water Act (CWA) and California environmental statutes.

In 1986, McClellan Ecological Seepage Situation (MESS) sued appellee Secretary of Defense, alleging that McClellan's past and present cleanup activities violated RCRA, CWA and related California laws. Primarily, MESS sought to compel McClellan's compliance with RCRA's reporting and permitting requirements, require it to obtain a CWA permit for leaching from its inactive waste pits, and meet state notification requirements for contaminant discharge.

The district court found that MESS's claims directed at McClellan's ongoing cleanup efforts were challenges to CERCLA remedial and removal actions and therefore barred by CERCLA section 113(h). With respect to current and future waste disposal operations, the court concluded that section 113(h) did not preclude MESS's claims.

Section 113(h) deprives federal courts of jurisdiction to review " . . . any challenges to removal or remedial action. . . . " undertaken pursuant to CERCLA, except citizen suits alleging that a cleanup action "taken" or secured" under the statute "was" in violation of its provisions.

On appeal, MESS contended that section 113(h) does not apply to citizen suits or actions brought under non-CERCLA statutes. MESS argued that waste storage and disposal site operators like McClellan might try to avoid RCRA liability by hiding under a CERCLA umbrella unless challenges under non-CERCLA statutes were not permitted.

[1] ON its face, section 113(h) precludes any contemporaneous challenge to a CERCLA cleanup, [2] not

just those brought under other provisions of CERCLA. [3] Nor does the prohibitory language of section 113(h) distinguish between plaintiffs. If it did not include citizen suits, there would be little need for its exception for citizen suits challenging *past* cleanup actions.

[4] Whatever theoretical potential there was for evasion of RCRA in other cases, it did not exist in this one. McClellan's MAP incorporated the requirements of all relevant hazardous waste legislation. [5] Although it was true that MESS was unable to obtain immediate judicial review of McClellan's compliance with RCRA, CWA and like statutory requirements during the course of the cleanup, Congress determined that swift execution of CERCLA cleanup plans outweighed this concern.

[6] The compliance with RCRA that MESS sought [7] would constitute the kind of interference with the cleanup plan that Congress sought to avoid or delay with section 113(h). [8] To a greater degree, an injunction or declaration requiring compliance with RCRA permitting requirements would also interfere with the cleanup. [9] Because MESS sought to improve on the cleanup embodied in the Interagency Agreement, its action qualified as a "challenge" to the cleanup.

[10] The leaching process was a necessary component of the CERCLA plan's groundwater extraction system. Claims focusing on it could not be sustained until the cleanup was completed. [11] The source of surface water contaminants was not dispositive. The court's inability to fashion a remedy that would not interfere with McClellan's cleanup action was, however.

[12] The Interagency Agreement did not cover McClellan's active sites. Section 113 thus did not bar MESS's claims asserting RCRA noncompliance at them. [13] It was unclear what claims remained relating to active sites. [14] The district court was in the best position to make that determination.

COUNSEL

Michael Axline, Western Natural Resource Law Clinic, Eugene, Oregon, counsel for the plaintiffs-appellants-appellees.

Ellen J. Durkee, United States Department of Justice, Washington, D.C., counsel for the defendant-appellee-appellant.

OPINION

CANBY, Circuit Judge:

This is an action brought by McClellan Ecological Seepage Situation ("MESS") to require McClellan Air Force Base to comply with various environmental laws. The district court ruled against MESS and MESS appealed. The Secretary of Defense cross-appealed on the ground that MESS's appeal was untimely – a contention that we reject.[1]

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[1] The district court granted MESS's motion to extend the time for appeal on the ground of excusable neglect. The government's motion to dismiss the appeal was denied by a motions panel of this court on the ground that the appeal time had not

After hearing argument, we remanded the case to the district court for certain findings regarding the jurisdiction of the federal courts to entertain many of MESS's claims. The district court determined that most of MESS's claims, brought under the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901-6992 ("RCRA"), the Clean Water Act, 33 U.S.C. §§ 1251-1387, and several California state environmental statutes, must be dismissed for lack of jurisdiction. The findings indicate that the Department of Defense is engaged in a cleanup at McClellan Air Force Base, conducted pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 ("CERCLA" §§ 101-175).[2] and that the bulk of MESS's claims constitute an impermissible challenge to that cleanup.

After again hearing argument, we accept the district court's Findings and Determination with respect to all of MESS's claims relating to inactive waste storage sites being cleaned up by McClellan pursuant to CERCLA. We therefore vacate the original judgment, and instruct the

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begun to run because the entry date of the final judgment did not appear on the court docket. The government correctly states that we may revisit the decision of the motions panel. *See United States v. Houser*, 804 F.2d 565, 568-69 (9th Cir. 1986). We do so, but reject the government's cross-appeal because we conclude that the district court did not abuse its discretion in implicitly finding excusable neglect. *See Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489, 1496-98 (1993).

[2] As amended by the Superfund Amendments and Reauthorization Act of 1986, codified as amended at 42 U.S.C. §§ 9601-9675.

district court to dismiss those claims for lack of jurisdiction. We agree with the district court that jurisdiction exists over the remaining claims, which are all challenges relating to active sites excluded by the CERCLA Plan. We remand those claims for further consideration by the district court.

BACKGROUND

Since the 1930's, McClellan Air Force Base has served as an aircraft depot and maintenance center for the Army, and subsequently the Air Force. The repair and maintenance of our military aircraft have always required the use of toxic and hazardous materials which, after they have served their purpose, become hazardous wastes requiring disposal.[3] Until 1976, McClellan disposed of large quantities of its wastes by burying them in earthen pits on the Base. During the several preceding decades, operations at McClellan generated a great deal of uncontained hazardous waste, some of which leached into the groundwater beneath the Base.

In 1979, McClellan began a groundwater monitoring program as a first step in its cleanup of Base contamination. When Congress enacted CERCLA in 1980, the McClellan cleanup continued under the authority of the Department of Defense's Installation Restoration Program, pursuant to CERCLA Section 104. In compliance

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[3] Some of the wastes generated at McClellan over the years include industrial solvents, caustic cleaners, heavy metals, polychlorinated biphenyls (PCBs), oils and lubricants, contaminated jet fuel, low-level radioactive wastes, electroplating chemicals and several volatile organic compounds (VOCs).

with requirements of the Superfund Amendments and Reauthorization Act of 1986, which amended CERCLA. McClellan again modified its cleanup program to conform to a now-required Interagency Agreement between the Air Force, the federal Environmental Protection Agency ("EPA") and the State of California. The Agreement bound McClellan to incorporate all applicable legislative requirements into its cleanup through a Management Action Plan. McClellan's cleanup effort has proceeded under the authority of both CERCLA and the Interagency Agreement since the Agreement's effective date of May 2, 1990.

A major component of McClellan's CERCLA cleanup plan is its groundwater extraction system. The system allows contaminants to leach from the inactive waste pits into the groundwater. The groundwater is then mechanically extracted and treated. Through this "leach-extract-treat" cycle, all contaminants are expected to be removed from the inactive pits, and migration of contaminated groundwater away from the Base to be prevented.

On April 23, 1986. MESS brought this action against the Secretary of Defense, alleging that McClellan's past and present treatment, storage and disposal of hazardous wastes violated RCRA, the Clean Water Act, the California Health and Safety Code, the California Water Code, and the California Fish and Game Code. MESS sought declaratory relief, civil penalties, and an injunction against any further treatment, storage, discharge or disposal of hazardous wastes at McClellan until all federal and state hazardous waste requirements were met. The district court, as we have said, denied MESS's claims on the merits.

On appeal, the Secretary raised for the first time a threshold jurisdictional issue, arguing that CERCLA Section 113(h) denies federal courts the jurisdiction to entertain MESS's challenge to the ongoing CERCLA cleanup action at McClellan. We remanded to the district court to develop the record further with regard to the progress and scope of CERCLA activities at McClellan, and to determine whether MESS's claims constituted a challenge to the CERCLA cleanup, placing them beyond federal court jurisdiction. The district court found that "a comprehensive cleanup effort is currently underway at [McClellan]," and determined that each of MESS's claims for relief that were directed at sites now undergoing cleanup activities constituted challenges to CERCLA remedial and removal actions. The court thus concluded that CERCLA Section 113(h) bars those challenges. With respect to RCRA compliance for current and future waste disposal operations at McClellan, the district court found that Section 113 does not bar MESS's claims.

MESS disputes the district court's determination, arguing first that Section 113 applies neither to citizen suits nor to actions brought under non-CERCLA statutes. MESS also contends that even if Section 113 does apply to the present action, none of MESS's claims constitute "challenges" to the CERCLA cleanup effort at McClellan, because MESS merely seeks compliance with existing RCRA and Clean Water Act standards that McClellan is already bound to follow. WE address each argument in turn.

ANALYSIS

I. Scope of CERCLA § 113(h)

[1] Section 113(h) of CERCLA provides:

> (h) **Timing of review**
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> No Federal court shall have jurisdiction under Federal law . . . or under State law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:
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> * * * *
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> (4) an action under section 9659 of this title (relating to citizen suits) alleging that the removal or remedial action *taken* under section 9604 of this title or *secured* under section 9606 of this title *was* in violation of any requirement of this chapter. . . .
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> * * * *

42 U.S.C. § 9613(h) (emphasis supplied). On its face, then, section 113(h) precludes contemporaneous challenges to CERCLA cleanups. MESS interprets this section, however, to mean that federal courts are jurisdictionally barred from reviewing *only those challenges to CERCLA cleanup actions brought under CERCLA provisions.* In our view, however, section 113(h) is not so limited.

[2] Section 113(h) is clear and unequivocal. It amounts to a "blunt withdrawal of federal jurisdiction." *North Shore Gas Co. v. E.P.A.*, 930 F.2d 1239, 1244 (7th Cir. 1991). Contrary to MESS's position, the unqualified language of the section precludes "any challenges" to

CERCLA Section 104 cleanups, not just those brought under other provisions of CERCLA. *See Arkansas Peace Ctr. v. Department of Pollution Control*, 999 F.2d 1212, 1217 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1397 (1994) (holding that section 113(h) bars a challenge based upon RCRA); *North Shore Gas*, 930 F.2d at 1244 (same).

[3] MESS alternatively contends that Section 113(h) withdraws federal jurisdiction only for challenges brought by potentially responsible parties, and does not affect actions brought under the citizen suit provisions of environmental statutes. This argument is contradicted by the plain words of the statute. The prohibitory language of Section 113(h) does not distinguish between plaintiffs. The statute divests federal courts of jurisdiction over *"any challenges"* to removal or remedial actions under CERCLA. If the prohibitory language did not include citizen suits, there would have been little need for the exception in subsection (h) for citizen suits challenging *past* cleanup actions. MESS's reliance on legislative history to show that congressional intent differs from the statute's plain wording is not persuasive.[4] We therefore conclude that Section 113 withholds federal jurisdiction to review any of MESS's claims, including those made in citizen suits and under non-CERCLA statutes, that are found to constitute "challenges" to ongoing CERCLA cleanup actions.

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[4] Because the statutory language is so clear, MESS must overcome a strong presumption that the plain language of the statute expresses Congress' intent. *See Ardestani v. INS*, 112 S.Ct. 515, 520 (1991). For MESS's purposes, the legislative history of Section 113(h) is at best, unclear.

MESS expresses concerns that waste storage and disposal site operators like McClellan might try to avoid RCRA liability by hiding under the protective umbrella of a CERCLA cleanup plan. MESS and amici[5] argue that in this situation, affected citizens would never have recourse for the resulting RCRA violations, and pollution would go unchecked.

[4] Whatever the theoretical potential for an evasion of RCRA in other cases, it does not exist here. McClellan's Management Action Plan incorporates the requirements of all relevant hazardous waste legislation. *See* **McClellan Air Force Base Interagency Agreement** §§ 1.2(e), 6.1, and 17 (signed July 21, 1989); Finding and Determination RE: Jurisdiction, p. 11 (October 23, 1993). The parties to the agreement clearly intended that McClellan be bound by these requirements. The Management Action Plan is a comprehensive scheme that takes into account all applicable statutory requirements, including those of RCRA and the Clean Water Act, and coordinates compliance with each. McClellan therefore has, without question, an obligation to comply with substantive RCRA and Clean Water Act requirements.

[5] It is true that MESS is now unable to obtain immediate judicial review of McClellan's compliance with RCRA, the Clean Water Act, and similar statutory requirements during the course of the cleanup program, but this inability was Congress's choice. Although judicial review is an important element in the enforcement of

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[5] Amici States of Alaska, Connecticut, Hawaii, Indiana, Illinois, Kansas, Kentucky, Montana, Ohio, Oklahoma, Texas and Utah filed a brief on behalf of MESS.

laws such as RCRA and the Clean Water Act, Congress has determined that the need for swift execution of CERCLA cleanup plans outweighs this concern. Section 113(h) protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort. This result furthers the policy underlying CERCLA by allowing a quick response to serious hazards. *See Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1018-19 (3d Cir. 1991). Congress concluded that the need for such action was paramount, and that peripheral disputes, including those over "what measures actually are necessary to clean-up the site and remove the hazard," may not be brought while the cleanup is in process. *Id.* at 1019.

We recognize that the application of Section 113(h) may in some cases delay judicial review for years, if not permanently,[6] and may result in irreparable harm to other important interests. Whatever is likelihood, such a possibility is for legislators, and not judges, to address. We must presume that Congress has already balanced all concerns and "concluded that the interest in removing the hazard of toxic waste from Superfund sites" clearly outweighs the risk of irreparable harm. *Id.* at 1023.

Having concluded that Section 113(h) would bar any of MESS's claims that challenge the CERCLA effort at McClellan, we must now determine which, if any, of the claims actually comprise "challenges" to the cleanup within the meaning of the statute. Because the effects of

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[6] We do not here decide whether or to what extent the district court can entertain MESS's various claims after implementation of the CERCLA cleanup at McClellan is complete.

each of MESS's claims upon the cleanup are distinct, we analyze them separately.

II. The "Inactive" Waste Pits and RCRA Compliance

[6] Although MESS's complaint sought various forms of injunctive relief, MESS now seeks primarily to compel McClellan's compliance with RCRA's individual reporting and permitting requirements, in addition to the Interagency Agreement's comprehensive requirements.[7] MESS argues that, in seeking such relief, it does not challenge the CERCLA cleanup plan.

[7] We agree with McClellan, however, that such relief would constitute the kind of interference with the cleanup plan that Congress sought to avoid or delay by the enactment of Section 113(h). The Interagency Agreement now integrates RCRA obligations into its own reporting requirements. The parties to the Agreement deemed those reporting requirements to be sufficient; MESS clearly wants more. The additional reporting requirements that MESS would have us impose would second-guess the parties' determination and thus interfere with the remedial actions selected under CERCLA Section 104.

[8] To an even greater degree, an injunction or declaration requiring McClellan to comply with RCRA permitting requirements would also interfere with the

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[7] 42 U.S.C. § 6930 (RCRA § 1031) requires the operator of a hazardous waste treatment, storage or disposal facility to file specific reports: 42 U.S.C. § 6925 (RCRA § 1026) requires a permit for any such facility.

CERCLA cleanup. As McClellan points out, the entire purpose of a permit requirement is to allow the regulating agency to impose requirements as a condition of the permit. The injection of new requirements for dealing with the inactive sites that are now subject to the CERCLA cleanup (or McClellan's defense against imposition of such requirements) would clearly interfere with the cleanup.

[9] It is true, as MESS argues, that every action that increases the cost of a cleanup or diverts resources or personnel from it does not thereby become a "challenge" to the cleanup. The enforcement of minimum wage requirements, for example, might increase the cost of cleanup and even divert personnel from cleanup duties without becoming a challenge to the cleanup. MESS's lawsuit, however, is far more directly related to the goals of the cleanup itself than is the hypothetical minimum wage action. MESS, for all practical purposes, seeks to improve on the CERCLA cleanup as embodied in the Interagency Agreement. Its action qualifies as a "challenge" to the cleanup.

III. Inactive Waste Pits and Clean Water Act Compliance

MESS alleges, and McClellan does not dispute, that contaminants from the inactive pits continue to leach downward into groundwater beneath the Base. This leaching, according to MESS, constitutes a "point discharge" of pollutants into "waters of the United States" which, without an authorization permit, violates 33 U.S.C. § 1311 (Clean Water Act). MESS would require

McClellan to procure a Clean Water Act permit authorizing all leaching from the inactive pits. The relief sought would also compel McClellan's compliance with individual state notification requirements for contaminant discharge. Absent the permit and compliance. MESS would prohibit any discharges.

[10] McClellan has amply demonstrated that the leaching in question is closely connected to the CERCLA action. The leaching process is a necessary component of the CERCLA plan's groundwater extraction system, which was designed to prevent migration of contaminants away from McClellan. Any delay or interruption of the process will slow the cleanup action, a result that Congress sought to avoid in enacting Section 113(h). The district court found that claims focusing on the groundwater underlying the Base were "directed at an integral part of the cleanup and, as such, may not be sustained until cleanup is completed." We agree with the district court that MESS's Clean Water Act and state water law claims, as they pertain to leaching of contaminants, are challenges to the continuing CERCLA response and are consequently beyond federal jurisdiction.

A slightly different question exists with regard to McClellan's alleged discharges of pollutants into surface waters. MESS asserts in its complaint that contaminants from the inactive pits discharge laterally, through perched groundwater, seeps and pipes, into the Magpie Creek at points where it crosses the Base. McClellan responds that because the sources of the alleged contaminants, the inactive pits, are subjects of the CERCLA response action and its attendant Management Action

Plan, the surface water contamination claims also should be barred. We agree.

[11] The source of the alleged surface water contaminants is not dispositive of MESS's claim. What is dispositive, however, is the court's inability to fashion any remedy that would not interfere with McClellan's CERCLA groundwater extraction system. While the contaminants allegedly destined for Magpie Creek are moving laterally through the soil, unlike the downward-leaching pollutants, it is impossible to require any Clean Water Act compliance measure to remedy lateral contaminant discharges from the pits that would not actively "challenge" CERCLA activities directed at remedying the downward discharges. MESS's claims pertaining to discharge via seepage and pipes into Magpie Creek therefore are excluded from federal court jurisdiction.

IV. McClellan's Current Operations

[12] MESS also claims that "current operations" at McClellan are not in compliance with RCRA permitting requirements. We accept the district court's determination that the Interagency Agreement does not cover McClellan's active sites. Findings and Determination RE: Jurisdiction, p. 26, Section 113 thus does not bar MESS's claims asserting RCRA noncompliance at those active sites. Some dispute existed between the parties both in briefing and at oral argument over what the term "current operations" included. In order to clarify the limits of our holding, we also adopt the district court's characterization of "current operations" as those involving active

waste treatment and storage sites not covered by the Interagency Agreement.

[13] When the district court entered its original judgment, it purported to determine all claims. Because the jurisdictional bar of Section 113(h) of CERCLA had not been asserted before the district court at that time, the court did not differentiate in its opinions between those sites that were subject to the CERCLA cleanup plan and those "active" sites that were not. It is accordingly not clear to us now just what claims remain relating to the "active" sites not covered by the cleanup plan, and what disposition, if any, the district court already may have made of those claims.

[14] That determination is a difficult one no matter who makes it. We conclude, however, that the district court is in the best position to secure the active participation of the litigants in determining exactly what, if anything, is left of this case. We therefore remand the matter to the district court for determinations concerning: (1) the extent of MESS's claims not precluded by Section 113(h) of CERCLA or otherwise abandoned; (2) the degree to which the district court has already ruled on those claims; and (3) any further determinations (with or without evidentiary proceedings) that the district court deems appropriate or necessary to dispose of this case and enter a new final judgment.

CONCLUSION

The district court correctly determined that CERCLA Section 113(h) withholds federal jurisdiction to review citizen suits and actions brought under other, non-

CERCLA statutes that challenge ongoing CERCLA cleanup actions. The court was also correct in finding that all of MESS's claims for relief connected with McClellan's inactive pits and sites were challenges to McClellan's CERCLA cleanup. Finally, we accept the district court's determination that MESS's claims against the active waste storage sites are not barred by Section 113(h).

We vacate the original judgment of the district court and remand this matter to the district court with instructions to dismiss MESS's claims relating to the inactive sites for lack of jurisdiction, and to conduct any further proceedings the district court deems necessary or appropriate to resolve and enter final judgment regarding MESS's claims relating to active sites. Each party will bear its own costs.

VACATED AND REMANDED WITH INSTRUCTIONS.

McCLELLAN ECOLOGICAL SEEPAGE SITUATION (MESS), Mary Fisher, Charles and Sandy Yarbrough, Plaintiffs,

v.

Caspar Willard WEINBERGER, Secretary of the United States Department of Defense, Defendant.

No. CIV S-86-475-RAR.

United States District Court,
E.D. California.

Dec. 9, 1986.

Claim was brought against Secretary of Defense for various types of relief from air force base's alleged violation of certain provisions of Resource Conservation and Recovery Act and Clean Water Act. Government move to dismiss. The District Court, Ramirez, J., held that United States had not waived sovereign immunity regarding imposition of civil penalties against federal facilities under either statute.

Motion granted.

Michael Axline, John E. Bonine, Western Natural Resources Law Clinic, University of Oregon School of Law, Eugene, Or., Victor Sher, San Francisco, Cal., Stephen L. Samuels, U.S. Dept. of Justice, Washington, D.C., for plaintiffs.

F. Henry Habicht II, Asst. Atty. Gen., Stephen L. Samuels, U.S. Dept. of Justice, Washington, D.C., Peter A. Nowinski, U.S. Atty., Yoshinori H.T. Himel, Asst. U.S. Atty., Sacramento, Cal., for defendant.

OPINION AND ORDER GRANTING MOTION OF DEFENDANT TO DISMISS CLAIM FOR CIVIL PENALTIES

RAMIREZ, District Judge.

This matter came on for hearing on November 3, 1986 on defendant's motion to dismiss plaintiff's claim for civil penalties. The Court rendered an oral ruling granting the motion to dismiss at the conclusion of that hearing, and this opinion specifically incorporates by reference the reasons articulated in that ruling.

This action was commenced on April 23, 1986 when a group of citizens calling themselves McClellan Ecological Seepage Situation ("MESS") filed a complaint against Caspar Willard Weinberger, Secretary of the United States Department of Defense, alleging that McClellan Air Force Base violated certain provisions of the Resource Conservation and Recovery Act ("RCRA") and the Clean Water Act ("CWA"). In the complaint, MESS seeks declaratory relief, injunctive relief, and the payment of civil penalties. The present motion relates only to the request for civil penalties.

This matter involves an issue of sovereign immunity. It is axiomatic, of course, that the United States is sovereign. It cannot be sued unless it consents to be sued. *Block v. North Dakota*, 461 U.S. 273, 287, 103 S.Ct. 1811, 1819, 75 L.Ed.2d 840 (1983). There cannot be a waiver of sovereign immunity unless the waiver is clear, concise, and unequivocal. *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 734, 102 S.Ct. 2118, 2122, 72 L.Ed.2d 520 (1982). When there is any doubt, waiver will not be found. Waiver cannot be implied. It cannot be assumed. It

cannot be based on speculation, surmise, or conjecture. *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969). Ambiguous language will not equate to waiver. Any limitation on the United States' consent to be sued must be strictly construed in favor of the sovereign and may not be modified by implication. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683-85, 103 S.Ct. 3274, 3276-77, 77 L.Ed.2d 938 (1983).

In this case, there are four potential areas for waiver of sovereign immunity, two under RCRA and two under the Clean Water Act. Turning first to RCRA, the relevant provisions are the federal facilities provision set forth in RCRA § 6001, 42 U.S.C. § 6961, and the citizen suit provision in RCRA § 7002, 42 U.S.C. § 6972.

The RCRA federal facilities provision states in relevant part that federal agencies shall be subject to and comply with "all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief)." The plain face, common-sense reading of this provision convinces this Court that there has not been a waiver of sovereign immunity regarding the imposition of civil penalties against federal facilities under RCRA. The plain face reading of this legislation demonstrates that Congress intended to waive sovereign immunity on behalf of the United States, insofar as process or sanctions is concerned, only as required for the enforcement of injunctive relief. As argued by the government in its moving papers, this language infers, implies, and requires a preexisting order of the Court to be enforced – no more, no less.

The Court recognizes that this is an issue of first impression. There are several cases that do not specifically and succinctly apply to the facts but are nevertheless instructive, and therefore the Court will make brief reference to them.

The Ninth Circuit's decision in *California v. Walters*, 751 F.2d 977 (9th Cir.1984), is the only case to examine RCRA § 6001 in the context of waiver of immunity for criminal penalties. The Court, in finding no wavier, specifically found that RCRA § 6001 plainly waives immunity to sanctions but only as imposed to enforce injunctive relief. What is significant is the Court's statement that "this only makes more conspicuous its failure to waive immunity to criminal sanctions." 751 F.2d at 978. While *Walters* is not directly on point since it does not involve civil penalties or a citizen suit, a waiver is a waiver whether it be for criminal and/or civil penalties.

That leads to an even more instructive case, *Meyer v. United States Coast Guard*, 644 F.Supp. 221 (E.D.N.C.1986), wherein Judge Britt, again reviewing RCRA § 6001, found that there has not been a clear and unambiguous waiver on behalf of the United States regarding the imposition of fines and/or other civil penalties. *Meyer*, unlike *Walters*, dealt specifically with civil penalties as opposed to criminal penalties.

But whether or not *Walters* or *Meyer* is applicable, the Court finds that RCRA § 6001 on its face does not provide clearly and succinctly for a waiver of sovereign immunity for civil penalties, and none will be implied.

We turn then to MESS' alternative argument that the citizen suit provision, RCRA § 7002, provides the necessary vehicle for waiver of sovereign immunity. Again, the Court disagrees. While RCRA § 7002 specifically defines "person" to include the United States for purposes of administration of the statute and/or jurisdiction, the citizen suit provision specifically refers to civil penalties under subsections (a) and (g) of RCRA § 3008, 42 U.S.C. § 6928(a) and (g). A cursory review of subsections (a) and (g), which are the federal enforcement provisions relating to compliance orders and civil penalties, reveals that they do not refer to the United States but to "persons." The Court must then take into consideration the general definition of "person" in RCRA § 1004(15), 42 U.S.C. § 6903(15), which seems to name everyone under the sun save for the United States of America. The Court therefore adopts the reasonable interpretation set forth by the government that indeed Congress did not intend, nor did it legislate specifically, a waiver of sovereign immunity for civil penalties under the citizen suit provision.

This Court cannot believe that if Congress wished to waive immunity for civil penalties it could be so careful, so all-knowing, so engaged in foresight and insight as to define "person" to include the United States for purposes of jurisdiction in the RCRA citizen suit provision, and yet could forget, misappropriate, or be so negligent as to decline to include the United States in its overall, all-encompassing definition of "person" in RCRA § 1004(15), which is applicable to compliance orders and civil penalties. If I were to accept what has been espoused by plaintiff in this case, we would have a unique and absurd result whereby the Administrator of the Environmental

Protection Agency would not be able to seek penalties against the United States because the United States is not a "person" within the meaning of RCRA § 3008(g), yet a private citizen could seek and be awarded the imposition of civil penalties under RCRA § 7002. If that is what Congress intended, it certainly escapes this Court. It is the opinion of this Court that that is not what Congress intended.

Rather than focusing my decision on intent *per se*, I look to the face of the legislation and thereafter to the legislative history, and I do not find the necessary clear unequivocal waiver of sovereign immunity for civil penalties under RCRA.

We turn next to the Clean Water Act. And although counsel have been very able in both their written and oral argument, I take great exception to counsel for plaintiff who indicates that here, at last, we have a clear enunciation of a waiver of sovereign immunity. If anything, the mud gets muddier when we look to the Clean Water Act.

The federal facilities provision – CWA § 313(a), 33 U.S.C. § 1323(a) – is a compilation of ambiguity. The sentence that is specifically at issue reads "the United States shall be liable only for those civil penalties arising under Federal law," if there be any, "or imposed by a State or local court to enforce an order or the process of such court." The use of the word "or" as advocated by counsel for plaintiff, or the substitution of "and" for "or" as advocated by counsel for defendant, leads to very interesting results. If in fact a state law has been patterned "i" for "i" and "t" for "t" on federal law, under a disjunctive reading of the word "or" we would have a

scenario where civil penalties could not be applied under state and/or local court provisions, even under a state or local ordinance that was an exact carbon copy duplicate of the Clean Water Act, but could be imposed under the provisions of the Clean Water Act itself. How Congress envisioned that to be a vehicle to end the pollution which this country is facing escapes this Court.

On the other hand, if we were to read the phrase in the conjunctive so that "to enforce an order or process of such court" applies both to federal law and to state or local court law, the sentence in itself is an absurdity – it makes no sense whatsoever. Under that reading, the Court does not know what to do with the terminology "such court" since the only court mentioned is state or local court.

Either reading, then, appears to be an absurdity. Furthermore, the remainder of CWA § 313 does not waive sovereign immunity for civil penalties for the same reasons discussed in relation to RCRA § 6001.

As rightfully argued by counsel for plaintiff, Congress is not held to the standard of writing its statutes in an all-knowing and all-encompassing manner. This proceeding is not a grammar or semantics course on how to write a statute. Rather, the Court should look to the four corners of the statute and obtain and apply the clear meaning of the statute. Although the Court sympathizes with the plaintiff, that is exactly what the Court is attempting to do. But it is not possible to find a clear meaning to CWA § 313. Since the statute is not clear on its face, we must look to the legislative history.

Here, of course, we have a problem because the Clean Water Act's legislative history is of no assistance. If there is any assistance for plaintiff's position, it comes from the Clean Air Act, 42 U.S.C. §§ 7401-7642. The question then is do we bootstrap the legislative history of the Clean Water Act by reference to the Clean Air Act. The Court does not believe that that is what Congress envisions or the Supreme Court envisions when we are called upon to make a waiver of sovereign immunity.

As indicated earlier, a waiver of sovereign immunity must be clear and concise and unequivocal. It will not be based upon ambiguities. There will not be a waiver brought about by implication or by bootstrapping or by borrowing. That does not mean that Congress has a duty to write a waiver in a certain or specialized way. But it must write with a clear hand, an unequivocal hand. And the Court must assume that the learned members of Congress, some of whom are learned members of various bars, can say waiver of sovereign immunity for civil penalties just as easily as any eighth grader writing the same type of legislation. They have not done that. Instead, they have inserted conjunctive and disjunctive references that bring about absurd and contradictory results. From this absurdity and contradiction, the Court is asked to capture reason. It cannot.

Since the Court cannot capture reason from the written word, I have to conclude that plaintiff has not met its burden of demonstrating a waiver of sovereign immunity.

Similarly, with respect to the citizen suit provision of the Clean Water Act -- CWA § 505(a), 33 U.S.C. § 1365(a) – for the very same reasons that the Court finds no waiver

in the citizen suit provision of RCRA, there is no waiver in the Clean Water Act. Again, there is a definition of "person" that includes the United States in the jurisdictional provision of CWA § 505(a). And again, CWA § 505(a) refers to another civil penalties provision, CWA § 309(d), 33 U.S.C. § 1319(d). And again, there is an all-encompassing introductory definition – CWA § 502(5), 33 U.S.C. § 1362(5) – which defines "person" as everybody under the sun save for the United States.

This Court believes that although for twenty years Congress has been attempting to raise some definite reliance and response by federal facilities to get in line to clean up their water, air, etcetera, it has been very slow and cautious in its movements. Congress has finally gotten to the point where it has waived sovereign immunity so as to force federal facilities to be brought into compliance by way of injunctive relief only. It has not jumped the magical line, however, and waived sovereign immunity for purposes other than injunctive relief. Congress could easily have stated that federal facilities would be liable not only to injunctive relief but also to civil or criminal penalties. It is easier written than said. It is not written.

Defendant's motion to dismiss that portion of the complaint praying for civil penalties both under RCRA and the Clean Water Act is therefore granted.

IT IS SO ORDERED.

McCLELLAN ECOLOGICAL SEEPAGE SITUATION (MESS), Mary Fisher, Charles and Sandy Yarbrough, Plaintiffs,

v.

Caspar Willard WEINBERGER, Secretary of the United States Department of Defense, Defendant.

No. CIV S-86-475-RAR.

United States District Court,
E.D. California.

June 20, 1988.

Group of concerned citizens who lived near Air Force base brought action against Secretary of Department of Defense, alleging that base's practices and procedures with respect to industrial and domestic wastes violated and threatened to violate various environmental laws. On cross-motions for summary judgment, the District Court, Ramirez, J., held that: (1) claim for injunctive relief from use of treated waste-water in cooling towers was moot; (2) court lacked subject matter jurisdiction under Resource Conservation and Recovery Act citizen suit provision over counts alleging violations of California solid waste laws; (3) state statutory and regulatory provisions referred to in other counts did not constitute "requirements" as that term was used in Clean Water Act waiver of sovereign immunity provision, and court lacked jurisdiction over those counts under Act's citizen suit provision because provisions involved were not "effluent standards or limitations"; and (4) court would follow strict jurisdictional approach to notice provisions of environmental statutes.

Motions granted in part and denied in part.

Michael Axeline, Western Natural Resources Law Clinic, Eugene, Or., for plaintiffs.

Steve Samuels, U.S. Dept. of Justice, Washington, D.C., for defendant.

MEMORANDUM OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

RAMIREZ, District Judge.

INTRODUCTION

On April 23, 1986, plaintiffs McClellan Ecological Seepage Situation, Mary Fisher, and Charles and Sandy Yarbrough (hereinafter "MESS") brought this action seeking declaratory and injunctive relief as well as civil penalties against the Secretary of the Department of Defense under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6987; the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1376; California hazardous waste laws; and California water quality laws. The complaint, which originally included twenty-three counts, alleges violations of those statutes by McClellan Air Force Base ("McClellan") in Sacramento, California. On December 9, 1986, this Court granted the Government's motion to dismiss MESS' request for civil penalties. *McClellan Ecological Seepage Situation v. Weinberger*, 655 F.Supp. 601 (E.D.Cal.1986). Moreover, by stipulation and order, Counts 1, 4(A), 7, and 19(C) of the complaint have been dismissed without prejudice. (Orders dated August 4, 1987 and September 25, 1987.)

On July 2, 1987, MESS filed a motion for partial summary judgment with respect to Counts 2, 3, 4(B and C), 6, 8, 10, 12, 13, 14, 15, 16, 22, and 23 of its complaint. On October 26, 1987, the Government filed a motion for summary judgment, which relates to all counts of the complaint except those previously dismissed by stipulation and order. After full briefing of the cross-motions for summary judgment, oral argument was held on February 8, 1988. At the conclusion of the argument, the Court ruled from the bench on the cross-motions. This memorandum opinion formalizes that bench ruling.

MESS is a group of concerned citizens who live near McClellan Air Force Base. McClellan is a major aircraft maintenance facility operated by the Department of Defense. In its complaint, MESS alleges that McClellan's practices and procedures with respect to industrial and domestic wastes have violated and threaten to violate various environmental laws. Specifically, MESS alleges that McClellan's generation, treatment, and disposal of wastes are in conflict with RCRA (Counts 2 through 5); provisions of the California Health and Safety Code (Counts 6 through 11 and 21); the Clean Water Act (Counts 12 through 15, 22, and 23); provisions of the California Water Code (Counts 16 through 19); and the California Fish and Game Code (Count 20). Counts 2 through 11 are brought under the citizen suit provision of RCRA, RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A), and Counts 12 through 23 are brought under the citizen suit provision of the Clean Water Act, CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1).[1]

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[1] On April 1, 1988, the Court granted MESS' motion for leave to file an amended complaint. The amended complaint

By agreement of counsel and the Court, proceedings in this action were bifurcated. The present round of motions for summary judgment involves purely legal issues, undisputed facts, or facts the development of which have not required extensive discovery. Any issues not resolved in this round of motions will be subject to additional discovery and a second round of motions for summary judgment at a later date.

This opinion will address the remaining counts in MESS' complaint one-by-one. Each major section below (RCRA and the Clean Water Act) will be preceded by a brief overview of the relevant statutory provisions.

CLAIMS BROUGHT UNDER RCRA

Subtitle C of RCRA creates a "cradle-to-grave" management system which is intended to ensure that hazardous wastes are safely treated, stored, and disposed of after November 19, 1980. 42 U.S.C. §§ 6921-6934. Section 3005 of RCRA, 42 U.S.C. § 6925, requires facilities that treat, store, or dispose of hazardous waste after November 19, 1980 to obtain a permit from EPA or from a state authorized by EPA to administer its own hazardous waste program. There are two parts to a permit application – Part A and Part B. Part A requires general background information regarding the management of hazardous wastes at a facility, while Part B requires a much more extensive report. *See* 40 C.F.R. § 270.14.

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adds a cause of action based upon the Administrative Procedure Act. However, Counts 2 through 23 of the amended complaint are identical to Counts 2 through 23 of the original complaint.

Congress recognized that if every hazardous waste management facility in existence on November 19, 1980 was immediately subject to the permit requirements of RCRA, a bureaucratic nightmare would exist for the Environmental Protection Agency ("EPA"), the agency charged with administering RCRA in coordination with the states. Therefore, in order to provide for an ample amount of time to set up the administrative machinery necessary to accommodate all the requirements of RCRA, Congress established a program of interim status for facilities already in operation, such as McClellan. Under this program, certain existing hazardous waste management facilities are treated as having been issued a RCRA permit until final administrative disposition of their permit applications can be made. RCRA § 3005(e), 42 U.S.C. § 6925(e).

In order to obtain this "interim status," a hazardous waste management facility must fulfill three conditions. *See* RCRA § 3005(e)(1). First, the facility must have been in existence on November 19, 1980 or on the effective date of the statutory or regulatory changes which render the facility subject to the permit requirement. Second, where applicable, the owner or operator must have submitted preliminary notification to EPA stating the location and general description of its hazardous waste activity and listing the hazardous wastes involved in its operation. Finally, the owner or operator must have applied for a permit under RCRA § 3005. EPA has interpreted this third condition as requiring submission only of Part A of the permit application; Part B is submitted when EPA initiates the final permitting process for an individual facility. 40 C.F.R. § 270.1(b). Facilities with

interim status must comply with self-implementing technical standards that are analogous to but less stringent than the standards for permitted facilities. *See* 40 C.F.R. Part 270.1(b) and Part 265.

Congress was also concerned that the Federal government might not be able to administer the RCRA program effectively in all states. Accordingly, Congress enacted provisions which allow the various states to receive full or partial authorization to administer their own hazardous waste programs "in lieu of" the Federal program. Specifically, section 3006 of RCRA, 42 U.S.C. § 6926, provides that any state wishing to administer and enforce a hazardous waste program under RCRA may apply to the EPA Administrator for authorization. If the Administrator determines that the state program satisfies specified standards, the state is authorized to administer its program "in lieu of" the federal program. California received partial interim authorization in 1981 and 1983 but that authorization expired on January 31, 1986. 51 Fed.Reg. 4128 (Jan. 31, 1986).

Congress also provided for a limited waiver of sovereign immunity in RCRA. Specifically, section 6001 of RCRA, 42 U.S.C. § 6961, provides that facilities operated by the federal government are subjected to all federal, state, interstate, and local "requirements" respecting the control and abatement of solid waste or hazardous waste disposal. Moreover, section 7002(a) of RCRA, 42 U.S.C. § 6972(a), authorizes any person to commence a civil action against any other person, including the United States, who is alleged to be in violation of an obligation "which has become effective pursuant to" RCRA. However, such a citizen suit may be maintained only if the

plaintiff has provided sixty days notice of its claims to the alleged violator, the state, and EPA. RCRA § 7002(b)(1).

Waivers of sovereign immunity, of course, are not to be liberally interpreted. As this Court previously stated in dismissing MESS' claim for civil penalties, the United States cannot be sued unless it consents to be sued. *Block v. North Dakota*, 461 U.S. 273, 287, 103 S.Ct. 1811, 1819, 75 L.Ed.2d 840 (1983). There cannot be a waiver of sovereign immunity unless the waiver is clear, concise, and unequivocal. *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 734, 102 S.Ct. 2118, 2122, 72 L.Ed.2d 520 (1982). When there is any doubt, waiver will not be found. Waiver cannot be implied. It cannot be assumed. It cannot be based on speculation, surmise, or conjecture. *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969). Ambiguous language will not equate to waiver. Any limitation on the United States' consent to be sued must be strictly construed in favor of the sovereign and may not be modified by implication. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683-85, 103 S.Ct. 3274, 3276-77, 77 L.Ed.2d 938 (1983).

Count 2 – RCRA § 3005(a)

In Count 2 of the complaint, MESS alleges that McClellan has violated section 3005(a) of RCRA. That section prohibits the treatment, storage, or disposal of hazardous wastes after the effective date of regulations promulgated by EPA, except in accordance with a permit. MESS asserts that McClellan "has been discharging, storing, and treating hazardous wastes without a permit to do so since November 19, 1980, when the regulations identifying the characteristics of hazardous wastes (40

C.F.R. § 261.31) became effective." Complaint ¶ 45. Specifically, MESS contends that McClellan's Part A application did not mention "storage of hazardous wastes in the base cooling system and in unlined underground burial pits" (MESS Memorandum at 21) and that McClellan therefore lacks interim status with respect to those sites.

Cooling Towers

With respect to the cooling towers, McClellan states that in the past it has used treated wastewater from the base's reclamation system in approximately one hundred cooling towers that are used to cool buildings on the base. The treated wastewater was circulated through the cooling towers and then returned to the treatment facility. However, that practice was discontinued in October 1985 with respect to most of the cooling towers and in March 1986 – one month prior to the filing of the present suit – with respect to the remaining cooling towers. *See* Affidavit of Paul G. Brunner, attached to McClellan's motion for summary judgment, ¶ 8. MESS does not dispute McClellan's assertion that it has not used any treated wastewater in the cooling towers since March 1986.

McClellan's termination of the use of treated wastewater in the cooling towers makes Count 2 moot insofar as it relates to the towers. The citizen suit provisions of RCRA and the Clean Water Act are forward-looking; they are intended to remedy present and future harmful impacts, not conduct that has occurred entirely in the past and cannot reasonably be expected to result in future harm.

The Supreme Court recently addressed the purposes of the citizen suit provision of the Clean Water Act in *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). For present purposes, that provision is almost identical to the RCRA citizen suit provision. Based upon the actual language of that provision as well as the definition of "citizen," the Court concluded that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." 108 S.Ct. at 382. In order for a district court to have jurisdiction over a citizen suit claim, the Court concluded, the underlying complaint must contain a good-faith allegation that the conduct complained of is continuing in nature.

Here, the conduct complained of – use of treated wastewater in the cooling towers – was discontinued one month prior to the filing of the complaint. Therefore, the question might arise whether MESS' allegation that the conduct was continuing as of April 1986 was made in good faith. I need not reach that issue, however, because even where there is a good-faith allegation of a continuing violation, the claim might be moot where that allegation turns out to be in error. As the Supreme Court stated in *Gwaltney;*

> Longstanding principles of mootness . . . prevent the maintenance of suit when " 'there is no reasonable expectation that the wrong will be repeated.' " *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (CA2 1945). In seeking to have a case dismissed as moot, however, the defendant's burden "is a heavy one." 345 U.S.,

> at 633, 73 S.Ct., at 897. The defendant must demonstrate that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Phosphate Export Assn., Inc.*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968).

108 S.Ct. at 386 (emphasis added by *Gwaltney* Court).

The Court concludes that the Government here has met the heavy burden of demonstrating mootness. McClellan has provided evidence by means of the Brunner affidavit – and MESS has not disputed that evidence – that it has not used treated wastewater in the cooling towers for nearly two years. There is simply no reason to believe that McClellan has any intention of using treated wastewater in the cooling towers any time in the future. Accordingly, the Court grants the Government's motion for summary judgment on that part of Count 2 that seeks injunctive relief with respect to the use of treated wastewater in the cooling towers.

MESS has also requested declaratory relief on this and all other issues. The Court is not prepared to rule at this time on whether declaratory relief is appropriate with respect to claims that are dismissed on mootness grounds. Instead, the Court will ask that the parties brief that issue in the context of the next round of dispositive motions in this proceeding.

Waste Pits

MESS also alleges that McClellan is storing hazardous wastes in unlined waste pits in violation of RCRA. The crux of MESS' contention is that McClellan's Part A

application did not mention certain unlined burial pits on the base and therefore McClellan does not have interim status with respect to those pits. The Government's position is that all the waste pits not identified in its Part A have been inactive since at least November 19, 1980 and therefore a RCRA permit is not required with respect to those disposal sites.

RCRA is not a model of clarity in this respect. On the one hand, certain provisions suggest that the permit requirements are intended to apply only to the treatment, storage, or disposal of hazardous wastes occurring after November 19, 1980, the effective date of the RCRA implementing regulations. Section 3005(a) of RCRA specifically requires permits only for the management of hazardous wastes "after such date" that EPA's permit regulations take effect. In addition, EPA's regulations provide that permits are required only during the "active life" of hazardous waste management units. 40 C.F.R. § 270.1(c). *See also* 45 Fed.Reg. 33,068 (May 19, 1980) ("The Agency's intent is not to regulate under Subtitle C portions of facilities closed before the effective date of the regulations"); 45 Fed.Reg. 12,747 (Feb. 26, 1980) ("RCRA Subtitle C Regulations do not cover . . . abandoned sites").

On the other hand, certain provisions suggest that permit requirements may apply to the maintenance of an inactive disposal site within an active facility. For example, section 3004(u) of RCRA, 42 U.S.C. § 6924(u), provides that prior to issuing a permit to a facility, EPA may require corrective action with respect to certain releases of hazardous waste from past waste disposal sites at that facility. Similarly, section 3008(h), 42 U.S.C. § 6928(h),

provides EPA with enforcement authority to require corrective action with respect to releases of hazardous waste into the environment from facilities with interim status. Moreover, section 7003, 42 U.S.C. § 6973, authorizes EPA to bring suit against anyone who has contributed to the past handling, storage, treatment, transportation, or disposal of waste that may present an imminent and substantial endangerment to health or the environment.

Having said all this, the narrow question presented in Count 2 is whether McClellan was required to apply for a RCRA permit with respect to the waste pits that were not specifically identified in its Part A application. The answer to this question might very well turn on whether the waste pits were "active" after November 19, 1980. MESS contends that the pits were and continue to be active after that date because McClellan is actively "storing" hazardous wastes in the pits. The Government, on the other hand, contends that the wastes placed in the pits were intended for permanent disposal and that no new wastes have been added to those pits since November 19, 1980. The Government states that the only activity that has occurred at any of these sites relates to its Installation Restoration Program ("IRP"), which is designed to mitigate any actual or threatened damage to the environment caused by its past disposal activities, and that activities undertaken pursuant to the IRP are exempt from RCRA permit requirements. *See* section 121(a) of the Superfund Amendments and Reauthorization Act of 1986, adding new section 121(e) to the Comprehensive Environmental Response, Compensation, and Liability Act.

In view of the parties' disagreement as to whether McClellan actively managed hazardous wastes in the waste pits subsequent to November 19, 1980, the Court determines that there is a triable issue of fact that can benefit from further discovery. Accordingly, the cross-motions for summary judgment on Count 2 are denied insofar as that count relates to McClellan's waste pits.

Count 3 – RCRA § 3010(a)

Count 3 alleges that McClellan failed to give EPA notice of its hazardous waste activities under section 3010(a) of RCRA, 42 U.S.C. § 6930(a). That section provides that within ninety days of the promulgation of relevant regulations by EPA, persons engaged in hazardous waste activity shall file "a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person." MESS contends that McClellan violated this requirement because the notification filed by McClellan on August 19, 1980 omitted any mention of the hazardous wastes that are "stored" in the waste pits. The Government responds that the notification requirement was never intended as a means of locating inactive disposal sites and that it fully complied with section 3010(a) in any event.

Resolution of Count 3 might depend upon whether McClellan was actively handling hazardous wastes in the waste pits at the time that it filed its notification under section 3010(a). Because the Court has already concluded that that is a triable issue of fact, Count 3 should also remain open for now. Accordingly, the cross-motions for summary judgment on Count 3 are denied.

Count 4 – RCRA § 3005(e)

Count 4 alleges that McClellan is violating its interim status by using treated wastewater from the industrial waste treatment facility in the cooling system and by misstating in its Part A application the hazardous wastes to be treated, stored, or disposed of on the base.

Count 4 is principally a restatement of Count 2 and the same ruling should apply. Accordingly, that part of Count 4 that relates to the cooling towers is dismissed on mootness grounds with respect to injunctive relief but not declaratory relief, and the cross-motions for summary judgment are denied insofar as count 4 relates to McClellan's waste pits.

Count 5 – 40 C.F.R. Part 265

Count 5 alleges several violations of the provisions of 40 C.F.R. Part 265. Part 265 sets forth minimum standards for the management of hazardous waste during a facility's interim status. *See* 40 C.F.R. § 265.1.

MESS first asserts that McClellan has violated 40 C.F.R. § 265.15. Complaint ¶ 48. Section 265.15(a) requires owners of hazardous waste facilities to inspect their facilities for malfunctions and deterioration, operator errors, and discharges which may cause the release of hazardous waste constituents to the environment or a threat to human health. Section 265.15(c) requires owners to remedy any deterioration or malfunction in order to avoid an environmental or human health hazard.

MESS further alleges that McClellan is violating the interim status standards for waste piles (40 C.F.R.

§ 265.250) and land treatment 40 C.F.R. § 265.270). Specifically, MESS asserts that McClellan is violating the provisions of 40 C.F.R. §§ 265.250 and 265.270 "by storing hazardous waste drums on permeable bases, storing other hazardous wastes in unlined pits, and failing to protect these sites by water run-on control systems or water run-off management systems." Complaint ¶ 49.

Part 265 applies only to hazardous waste units that are subject to RCRA's interim status provisions. Thus, if a RCRA permit is not required for a particular unit, then that unit is not covered by Part 265. The Court will therefore defer ruling on Count 5 insofar as it relates to McClellan's waste pits for the same reason that a ruling on Count 2 has been deferred.

However, insofar as Count 5 relates to hazardous waste drums, summary judgment in favor of the Government is granted. The particular regulations cited by MESS – 40 C.F.R. §§ 265.250 and 265.270 – do not apply to waste drums. Rather, waste drums are covered by 40 C.F.R. § 265.170, which covers the use and management of containers. Section 265.170 does not in any way require a water run-on/run-off management system. In any event, it is undisputed that McClellan does have a management system in place to prevent water run-on and run-off in its staging areas. This system consists of secondary containment in the form of concrete berms, which prevent water from entering and hazardous waste spills from exiting the storage sites. McClellan also uses trailers with secondary containment features at its hazardous waste temporary staging areas. Brunner Affidavit ¶ 5.

Accordingly, the Government's motion for summary judgment on Count 5 is granted with respect to waste drums and denied with respect to waste pits.

Counts 6, 8, 9, 10, and 11 – California Solid Waste Law

MESS alleges in Counts 6, 8, 9, and 10 of the complaint that McClellan has violated various provisions of California solid waste law. Specifically, Count 6 alleges that McClellan has violated section 25201 of the California Health and Safety Code, which requires state permits for the treatment, storage, or disposal of hazardous wastes. Count 8 alleges a violation of section 25154 of the Health and Safety Code, which prohibits the handling, storage, use, processing, or disposal of hazardous wastes except as provided for under Chapter 6.5 of the Code or regulations adopted by the state. Count 9 alleges a violation of section 25155 of the Health and Safety Code, which prohibits the disposal of extremely hazardous wastes without prior processing to remove harmful properties. Count 10 alleges a violation of section 25203 of the Health and Safety Code, which prohibits the disposal of hazardous waste at any unpermitted disposal site.

Count 11 alleges that McClellan is violating certain discharge specifications in Order No. 78-99, issued by the California Regional Water Quality Control Board on September 8, 1978.

The Government contends that each of these counts should be dismissed for lack of jurisdiction under the RCRA citizen suit provision. Specifically, the Government argues that section 7002 of RCRA limits citizens suits to alleged violations of "any permit, standard, regulation,

condition, requirement, prohibition, or order which has become effective pursuant to [RCRA]." (Emphasis added.) According to the Government, the obligations alleged to have been violated in Counts 6, 8, 9, 10, and 11 are not effective pursuant to RCRA and therefore the Court lacks subject matter jurisdiction. The Court agrees.

A state statute could arguably have become effective pursuant to RCRA if it is part of a state hazardous waste program that has been authorized by EPA under section 3006 of RCRA, 42 U.S.C. § 6926, to apply in lieu of the federal hazardous waste program. Under section 3006(c)(1), EPA has the authority to grant interim authorization to state programs that are "substantially equivalent" to the federal program. Under section 3006(b), EPA may grant final authorization to state hazardous waste programs that: (1) are equivalent to the federal hazardous waste program; (2) are consistent with the federal program and other state programs that have received final authorization; and (3) provide adequate enforcement. Section 3006(c)(1) provides that a state's interim authorization automatically expires on January 31, 1986 and authority to administer and enforce the entire RCRA program reverts to the federal government on that date unless the state has been granted final authorization.

California received partial interim authorization on June 4, 1981. This authorization related to EPA's regulations in 40 C.F.R. Parts 260, 261, 262, 263, and 265, covering identification and listing of hazardous wastes, standards applicable to generators, standards applicable to transporters, and standards applicable to interim status facilities. *See* 50 Fed.Reg. 5259 Feb. 7, 1985). On January 11, 1983, California received additional interim

authorization under RCRA § 3006 limited to permitting authority for the storage and treatment of hazardous wastes in tanks and containers. This interim authorization specifically did not include permitting authority with respect to: (1) treatment of hazardous wastes in surface impoundments, waste piles, land treatment facilities, or incinerators; (2) storage of hazardous wastes in surface impoundments or waste piles; or (3) disposal facilities. 50 Fed.Reg. 5259. On January 31, 1986, even this limited authorization to administer the California hazardous waste program in lieu of the federal program expired. *See* 51 Fed.Reg. 4128 (Jan. 31, 1986). No part of the California hazardous waste program is presently authorized under RCRA § 3006.

Because California's interim authorization has expired, that state's hazardous waste laws are not even arguably "effective pursuant to [RCRA]." RCRA § 7002(a)(1)(A). Indeed, California never had authorization with respect to most of the provisions involved in Counts 6, 8, 9, 10, and 11. Under these circumstances, the violations of state statutory provisions alleged by MESS cannot be reviewed in the context of a citizen suit under RCRA § 7002.[2] Accordingly, this Court lacks jurisdiction

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[2] MESS contends that the federal facility provision of RCRA, section 6001, became effective pursuant to RCRA and therefore the Court has jurisdiction under section 7002. Section 6001, however, is not itself a "permit, standard, regulation, condition, requirement, prohibition, or order" as those terms are used in section 7002; rather, section 6001 is a waiver of sovereign immunity with respect to certain substantive and procedural requirements that have independent existence outside of section 6001. Indeed, Counts 6, 8, 9, 10, and 11 do not allege

over Counts 6, 8, 9, 10, and 11 and those counts must therefore be dismissed. It also follows that MESS' motion for summary judgment with respect to Counts 6, 8, and 10 must be denied.

In view of the above determination, it is not necessary to address the Government's alternative arguments that the state law counts should be dismissed on other grounds.

CLAIMS BROUGHT UNDER THE CLEAN WATER ACT

Section 301(A) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters of the United States except pursuant to a permit issued under section 402 of the Act, 33 U.S.C. § 1342. The EPA Administrator is directed to establish effluent limitations and standards of performance for "point sources" of pollution. CWA §§ 304, 306, 307, 33 U.S.C. §§ 1314, 1316, 1317. Through the National Pollutant Discharge Elimination System ("NPDES"), established pursuant to section 402 of the CWA, these standards and limitations, together with any applicable limitations based on state law, are incorporated into individual NPDES permits which regulate a particular person's discharges into waters of the United States.

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violations of section 6001; rather, they allege violations of state solid waste laws. It is these laws that must have become effective pursuant to RCRA for this Court to have jurisdiction under section 7002.

Under section 402(b) of the Clean Water Act, a state may administer NPDES permit program upon approval of EPA. California obtained such permitting authority on May 14, 1973. 39 Fed.Reg. 26,061.

As with RCRA, the Clean Water Act provides for a limited waiver of sovereign immunity. Specifically, section 313(a) of the Act, 3 U.S.C. § 1323(a), waives the sovereign immunity of federal facilities with respect to "all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution." Moreover, under section 505(a)(1), 33 U.S.C. § 1365(a)(1), any citizen may commence a civil action against any person, including the United States, who is alleged to be in violation of an effluent standard or limitation or an order issued by EPA or a state with respect to such a standard of limitation. The term "effluent standard or limitation" includes NPDES permits issued under section 402, but does not include state standards that are not part of a permit. CWA § 505(f). As is the case with citizen suits under RCRA, a citizen suit under the Clean Water Act cannot be maintained unless the plaintiff has provided sixty days notice of its claims to the alleged violator, the State, and EPA.

As discussed earlier in the context of RCRA, waivers of sovereign immunity are to be interpreted narrowly, they are not to be implied, and they must be clear and unambiguous.

Count 12 – NPDES Permit 78-232

McClellan's discharges to waters of the United States have been covered under a series of NPDES permits and

state orders. A chronology of McClellan's permits is set forth in the Brunner Affidavit.

Count 12 of the complaint alleges that McClellan violated the provisions of NPDES permit 78-232 every day between July 1, 1981 and July 1, 1983 by discharging waste to surface water drainage courses from outfall pipes 001 and 002. In the memorandum in support of its motion for summary judgment, MESS concedes that permit 78-232 remained in effect only until September 24, 1982 and therefore alleges that violations occurred only during the period July 1, 1981 to September 24, 1982. MESS Memorandum at 5-6.

In its motion for summary judgment, the Government offers two separate grounds for dismissing Count 12. First, the Government maintains that this Court lacks jurisdiction under section 505 of the Clean Water Act – the citizen suit provision – because Count 12 alleges violation that occurred entirely in the past. Second, the Government argues that Count 12 is moot because McClellan no longer discharges waste to surface water drainage courses from outfalls 001 and 002. This Court agrees with both of the Government's contentions.

As previously discussed, the Supreme Court recently held in *Gwaltney* that a district court has jurisdiction over a claim under section 505 only if the complaint contains a good-faith allegation that the purported violations are of a continuous nature, *i.e.*, that there is a reasonable likelihood that a past polluter will continue to pollute in the future. Here, on its face, Count 12 alleges only past violations. Count 12 does not allege that McClellan is continuing to violate NPDES Permit 78-232; indeed, it

could not since the permit expired by its own terms on July 1, 1983. Accordingly, under *Gwaltney*, this Court lacks jurisdiction with respect to Count 12.

Even if Count 12 did contain a good-faith allegation of a continuing violation, the issue is now moot in view of the uncontested evidence that McClellan now sends all of its domestic and industrial wastewater directly to the County waste treatment facility and no longer discharges any such wastewater to surface waters. Brunner Affidavit ¶ 19. As previously discussed, where "there is no reasonable expectation that the wrong will be repeated," 108 S.Ct. at 386, a claim should be dismissed as moot.

The Government's motion for summary judgment with respect to Count 12 is therefore granted and that count is dismissed with respect to injunctive relief. As was the case with Count 2, however, the Court is presently leaving open the possibility of granting declaratory relief with respect to Count 12. MESS' motion for summary judgment with respect to Count 12 is denied.

Count 13 – Order No. 82-125

Count 13 alleges that McClellan violated Order No. 82-125 each and every day during the period May 1 to October 31 in 1983, 1984, and 1985 by discharging domestic wastewater to surface water or surface water drainage courses.

Count 13 must be dismissed on the same grounds as Count 12. First, Count 13 alleges past rather than continuing violations and therefore this Court lacks jurisdiction under the citizen suit provision of the Clean Water Act. Second, because it is undisputed that McClellan no longer

discharges domestic wastewater to surface waters, Count 13 is moot. Accordingly, the Government's motion for summary judgment on Count 13 is granted except with respect to declaratory relief, and MESS' motion for summary judgment on Count 13 is denied.

Count 14 – CWA § 301 (Stormwater Discharges)

Count 14 of the complaint alleges that McClellan discharges stormwater run-off into Magpie, Second, and Arcade Creeks without an NPDES permit and is therefore in violation of section 301 of the Clean Water Act. Without conceding any past violations, the Government argues that Count 14 should be dismissed both because McClellan's present permit explicitly encompasses stormwater discharges and because recent amendments to the Clean Water Act make it clear that McClellan need not presently apply for a permit for discharges consisting entirely of stormwater. The Court agrees.

McClellan's most recent NPDES permit was issued on September 24, 1987. That permit expressly encompasses stormwater, both in its title and in its imposition of monitoring and reporting requirements for discharges of stormwater.

In addition EPA does not presently require permits for discharges consisting entirely of stormwater. *See* 50 Fed.Reg. 35, 200-03 (Aug. 29, 1985); 53 Fed.Reg. 4157 (Feb. 12, 1988). Moreover, section 405 of the Water Quality Act of 1987, Pub.L. No. 100-4, 101 Stat. 69 amended section 402 of the Clean Water Act and it is now evident that permits for industrial discharges consisting entirely of

stormwater might not be required until as late as February 4, 1993. MESS contends that this amendment nevertheless requires McClellan to monitor its discharges of stormwater. Even if this were true, that is exactly what McClellan is doing pursuant to its current NPDES permit.

For these reasons, the Government's motion for summary judgment is granted with respect to Count 14 and that count is dismissed except for the possibility of declaratory relief. MESS' motion for summary judgment on Count 14 is denied.

Count 15 – CWA § 301 (Discharges to Groundwater)

Count 15 alleges that McClellan is violating section 301 of the Clean Water Act by discharging hazardous substances from its waste pits to groundwater beneath the base without an NPDES permit.

Section 301(a) provides that in the absence of a permit, "the discharge of any pollutant by any person shall be unlawful." The term "discharge of a pollutant" is defined in section 502(12) as "any addition of any pollutant to navigable waters from any point source." The term "navigable waters," in turn, is defined in section 502(7) as "waters of the United States, including the territorial seas." Accordingly, section 301(a) requires permits for the addition of pollutants from point sources to waters of the United States.

The Clean Water Act does not on its face indicate whether groundwater constitutes "waters of the United States." Nevertheless, based upon the structure of the Act, its legislative history, and the relevant case law, this court concludes that Congress did not intend to require

NPDES permits for discharges of pollutants to isolated groundwater. On the other hand, permits might be required for discharges to groundwater that has a direct hydrological connection to surface waters that themselves constitute "waters of the United States."

The structure of the Clean Water Act indicates that Congress did not intend groundwater and navigable waters to be synonymous. For example, in section 102(a), 33 U.S.C. § 1252(a), Congress directed EPA to "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the *navigable waters and ground waters.*" (Emphasis added.) Of course, if "navigable waters" were the same as groundwater, it would have been unnecessary to refer to "groundwaters" separately. *See also* CWA § 104(a)(5), 33 U.S.C. § 1254(a)(5); CWA 106(e)(1), 33 U.S.C. § 1256(e)(1).

The legislative history of the Clean Water Act also demonstrates that Congress did not intend that discharges to isolated groundwater be subject to permit requirements. The report accompanying the Senate version of the Clean Water Act stated:

> Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil and other surface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.

S.Rep. No. 414, 92d Cong., 1st Sess. 73 (1971), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3739, *reprinted in* 2

Congressional Research Service of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess., at 1491 (Comm.Print 1973) (hereinafter "Leg. Hist.").

In addition, the House specifically rejected an amendment introduced by Rep. Aspin that would have brought groundwater within the permitting and enforcement sections of the bill. 118 Cong.Rec. 10,669 (1972), 1 Leg.Hist. 597. In opposing this amendment, Rep. Clausen, a sponsor of the House bill, stated:

> Mr. Chairman, in the early deliberations within the committee which resulted in the introduction of H.R. 11896, a provision for ground waters, similar to that suggested by the gentleman from Wisconsin, was thoroughly reviewed and it was determined by the committee that there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters.

118 Cong.Rec. 10,667 (1972), 1 Leg.Hist. 590-91 (remarks of Rep. Clausen). Thus, both the Senate and the House specifically rejected attempts to require permits for discharges to groundwater under the NPDES program.

EPA, the agency charged with administering the NPDES program, has also taken the view that discharges to groundwater are not prohibited by section 301(a).[3] In

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[3] An agency's interpretation of a statute that it is charged with administering is entitled to considerable deference. *See Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125, 105 S.Ct. 1102, 1107, 84 L.Ed.2d 90 (1985); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

an opinion dated December 13, 1973, EPA's Office of General Counsel ruled that EPA did not have general authority to regulate groundwater. Rather, according to the opinion, EPA's statutory authority to regulate discharges into the ground was limited to discharges into deep wells, and even then EPA could regulate only in conjunction with the regulation of discharges to surface waters.[4] Shortly after that opinion was issued, EPA promulgated regulations that reflected the General Counsel's interpretation. 38 Fed.Reg. 13,528 (May 22, 1973). *See* 40 C.F.R. § 125.26(a)(1) (1977). Subsequently, EPA eliminated even this narrow authority to regulate discharges into groundwater. 44 Fed.Reg. 32,854, 32,870 (June 7, 1979).

In addition to the structure of the Clean Water Act, its legislative history, and EPA's interpretation of its scope, the pertinent case law also demonstrates that discharges to isolated groundwater are not prohibited by section 301(a). In a case directly on point, the western district of Michigan dismissed a count in a citizen suit that alleged that a federal facility had violated section 301(a) by discharging toxic chemicals into the ground without an NPDES permit. *Kelley v. United States,* 618 F.Supp. 1103 (W.D.Mich.1985). After analyzing the statutory scheme and reviewing the relevant legislative history, the court held that "Congress did not intend the Clean Water Act to extend federal regulatory and enforcement authority over groundwater contamination." *Id.* at 1107.

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[4] The General Counsel's opinion is reproduced in full in *Exxon Corp. v. Train,* 554 F.2d 1310, 1320-21 n. 21 (5th Cir.1977).

In *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir.1977), the Fifth Circuit, while expressing no opinion as to whether EPA has jurisdiction over wastes that might " 'migrate' from groundwaters back into surface waters that concededly are within its regulatory jurisdiction," *id.* at 1312 n. 1, held that EPA did not have the authority to regulate discharges into deep wells as a condition to a permit that regulated discharges into navigable waters. *Id.* at 1329. *See also United States v. GAF Corp.*, 389 F.Supp. 1379, 1383 (S.D.Tex.1975) ("The disposal of chemical wastes into underground waters which have not been alleged to flow into or otherwise affect surface waters does not constitute a 'discharge of a pollutant' within the meaning of § 1311(a) [CWA § 301(a)]") (footnote omitted).

MESS places its principal reliance on the Supreme Court's decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). In that case, the Supreme Court upheld an interpretation by the Army Corps of Engineers that the Clean Water Act authorizes the Corps to require landowners to obtain permits before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries. In doing so, the Court stated that:

> the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed

> "navigable" under the classical understanding of that term.

Id., 106 S.Ct. at 462. Based upon this language in *Riverside Bayview*, MESS asserts that the Clean Water Act plainly requires permits for discharges to groundwater.

Riverside Bayview, although indicating that Congress intended the term "navigable waters" to have broad scope, does not resolve this case. First, *Riverside Bayview* involved surface waters only; the site at issue was wetlands adjacent to bodies of water that were navigable in the traditional sense, not isolated groundwater. There the Corps had concluded that "wetlands adjacent to lakes, rivers, streams and other bodies of water may function as integral parts of the aquatic environment." *Id.* at 463. Isolated groundwater, obviously, serves no such function.

Moreover, in *Riverside Bayview* it was the reasonableness of the Corps' determination that the Clean Water Act requires permits for the filling of wetlands that was under review. In that context, the Court applied the well-established doctrine that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *Id.* at 461. Here, however, MESS advances an interpretation of the Clean Water Act that is directly contrary to the construction of that statute by the Agency charged with enforcing the NPDES program.[5]

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[5] MESS contends that because Congress defined "point source" to include wells, "Congess understood groundwater to be regulated under the Act." MESS Response at 32. But MESS is

Whereas it is clear that Congress did not intend to require permits for discharges to isolated groundwater, it is also clear that Congress did mean to limit discharges of pollutants that could affect surface waters of the United States. In *Riverside Bayview*, for instance, the Court noted the importance of the Corps' conclusion that adjacent wetlands "may affect the water quality of adjacent lakes, rivers, and streams" by "serv[ing] to filter and purify water draining into adjacent bodies of water . . . and . . . slow[ing] the flow of surface runoff into lakes, rivers, and streams and thus prevent[ing] flooding and erosion." 106 S.Ct. at 463.

Other courts addressing the issue whether discharges to something other than "waters of the United States" are nonetheless covered by the NPDES program have also taken note of the ultimate effect on surface waters. *See Quivira Mining Co. v. United States Environmental Protection Agency*, 765 F.2d 126, 130 (10th Cir.1985) (noting that the discharges ultimately affected navigable-in-fact streams); *Exxon Corp. v. Train*, 554 F.2d at 1312 n. 1; *United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181, 1187 (D.Ariz.1975) (holding that "navigable waters" includes "any waterway within the United States also including

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confusing "point source" and "navigable waters." Permits are required for discharges from point sources, not to point sources. Thus, the fact that a well is a point source has nothing to do with whether a permit is required for a discharge to the well; it only means that a discharge from the well, such as overflow into surface waters, might require a permit. Moreover, groundwater is not synonymous with wells. Thus, even if discharges to wells did require permits, it does not follow that discharges to groundwater would also require permits.

normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States"); *United States v. GAF Corp.*, 389 F.Supp. 1379, 1383 (S.D.Tex.1975) (holding that permits are not required for the "disposal of chemical wastes into underground waters which have not been alleged to flow into or otherwise affect surface waters").

Taking all these factors into consideration, the Court concludes that MESS should be given the opportunity to engage in additional discovery to demonstrate a hydrological connection between the groundwater that lies below McClellan's waste pits and surface waters that themselves constitute "navigable waters." Only if MESS can show that discharges from the waste pits have an effect on surface waters of the United States can it prevail on Count 15. The mere fact that the groundwater might ultimately be consumed or might be used for irrigation purposes, as asserted by MESS, is not enough to bring the alleged discharges within the parameters of the NPDES program. Rather, MESS must establish that the groundwater is naturally connected to surface waters that constitute "navigable waters" under the Clean Water Act.

Because further discovery is necessary with respect to Count 15, the cross-motions for summary judgment are denied.

Counts 16, 17, 19, 20, and 21 – State Water Claims

Counts 16, 17, 19, 20, and 21 allege that McClellan has violated various state statutory and regulatory provisions.

MESS alleges in Count 16 that McClellan has violated section 13260 of the California Water Code. Section 13260 provides that "[A]ny person discharging waste . . . that could affect the quality of the waters of the state" shall file a report with the regional water quality board. MESS contends that McClellan has violated this provision by discharging toxic chemicals from unlined pits on the base into the groundwater beneath the base without notifying the regional water quality control board.

MESS alleges in Count 17 that McClellan violated section 13264(a) of the California Water Code, which requires the filing of reports prior to the initiation or change of any discharge. MESS alleges that McClellan has frequently changed the nature of its discharges and initiated new discharges without filing the required reports.

In Count 19, MESS alleges a violation of section 13350 of the California Water Code, which requires compliance with regional and state discharge regulations. Specifically, MESS asserts that McClellan has not complied with section 64403 of title 22 of the California Administrative Code – which purportedly requires water suppliers to "protect the water resources" under their control and to "assure" a supply of potable water to users – by discharging hazardous substances to an aquifer under the base from which base personnel receive their drinking water. MESS further asserts that McClellan is not an "approved waste management unit" and therefore has violated section 2520 of title 23 of the California Administrative Code, which purportedly permits discharges of waste to land only at such approved waste management units.

Count 20 alleges a violation of section 5650 of the California Fish and Game Code. That provision prohibits the discharge into state waters of "[a]ny petroleum . . . residuary product of petroleum, or carbonaceous material . . . [and] [a]ny refuse, liquid or solid, from any . . . chemical works [and] [a]ny substance or material deleterious to fish, plant life, or bird life."

Count 21 alleges a violation of section 5411 of the California Health and Safety Code, which prohibits the discharge of waste in any manner that will result in contamination, pollution, or nuisance.

The Government contends that the state statutory and regulatory provisions referred to in Counts 16, 17, 19(A), and 21 do not constitute "requirements" as that term is used in section 313 of the Clean Water Act, and therefore there has been no waiver of sovereign immunity with respect to these state provisions. The Government further maintains that this Court lacks jurisdiction over Counts 16, 17, 19, 20, and 21 under the citizen suit provision of the Clean Water Act because the state provisions involved in those counts are not "effluent standards or limitations" as defined in section 505 of the Act. The Court agrees with both elements of the Government's position.

Section 313

Section 313 waives sovereign immunity for "all Federal, State, interstate, and local requirements." The term "requirements" is not defined in the Clean Water Act; however, there is substantial case law that has given meaning to the term as used in section 313 and similar

provisions of other environmental statutes. In short, these cases have interpreted "requirements" to refer to objective and administratively pre-established water pollution control standards; section 313 and similar provisions in other statutes do not allow for the enforcement against federal facilities of state laws that require an *ad hoc* establishment of standards of conduct by the judiciary.

When originally enacted in 1972, section 313 provided that federal facilities "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements." In a 1976 opinion construing section 313, the Supreme Court held that federal facilities were not required under section 313 to obtain pollution discharge permits from states. *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976). A similar result was reached the same day with respect to the parallel immunity waiver of the Clean Air Act, section 118, 42 U.S.C. § 1857f (1976). *See Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976).

In response to the Supreme Court's holding in *EPA v. California*, Congress amended section 313 in 1977 to make clear that federal facilities were subject to procedural as well as substantive requirements. However, Congress did not broaden the kinds of substantive requirements for which sovereign immunity was waived. Thus, both before and after the 1977 amendments, federal facilities were subject to state "requirements . . . respecting the control and abatement of water pollution." As the First Circuit stated in *Romero-Barcelo v. Brown*, 643 F.2d 835, 854 n. 36 (1981), *reversed on other grounds sub nom. Weinberger*

v. Romero-Barcelo, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982), "[t]he apparent purpose of these amendments [to section 313] was to ensure the enforceability of the applicable substantive control requirements. We find no evidence that the amendments were intended to expand the category of applicable substantive requirements." *See also United States ex rel. TVA v. Tennessee Water Quality Control Board*, 717 F.2d 992, 997 (6th Cir. 1983), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1909, 80 L.Ed.2d 458 (1984) ("the 1977 amendments did not change the extent to which section 313 waived immunity from state or local control; it merely made it clear that where federal agencies are subject to state or local regulation they must comply with state or local procedural as well as substantive requirements").

The term "requirements . . . respecting the control and abatement of water pollution" has been construed narrowly by every court interpreting its scope. The Supreme Court indicated in *EPA v. California* that these "requirements" refer to the type of objectively quantifiable effluent limitations and standards set forth in sections 301, 302, 306, and 307 of the Clean Water Act, 33 U.S.C. §§ 1311, 1312, 1316, and 1317. *See* 426 U.S. at 215 n. 28, 96 S.Ct. at 2029 n. 28. In *State of New York v. United States*, 620 F.Supp. 374 (E.D.N.Y.1985), the court concluded that the substantive "requirements" of section 313 are coextensive with the "effluent standards or limitations" of section 505, *id.* at 383, and that in order to fall within the waiver of section 313, a cause of action must relate to "an objective, administratively predetermined effluent standard or limitation or administrative order upon which to measure the prohibitive levels of water

pollution." *Id.* at 384. In *Kelley v. United States*, 618 F.Supp. 1103 (W.D.Mich.1985), the court concluded that "requirements" in section 313 refers to "objective, quantifiable standards subject to uniform application." *Id.* at 1108.[6]

This Court agrees with the cases that have defined "requirements" to mean objective and administratively pre-established water pollution control standards. Even when the Court reads the complaint in the most liberal fashion, however, it finds that the state statutes and regulations involved in Counts 16, 17, 19A, and 21 of the MESS complaint fail to establish precise standards capable of uniform application. Count 16 involves a state statute that requires reports for discharges that "could affect the quality of the waters of the state." Count 17 involves an initiation or change in discharges. Count 19(A) involves a state regulation requiring that water suppliers "protect the water resources." And Count 21 involves a statute that prohibits discharges that result in "contamination," "pollution," or "nuisance." All of these provisions suffer from the same lack of precision and objectivity that led the courts in *State of New York* and *Kelley* to dismiss similar claims under the Clean Water Act. *See* 620 F.Supp. at 384-85; 618 F.Supp. at 1108.[7] *Section 505*

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[6] *See also Romero-Barcelo v. Brown*, 643 F.2d at 855 (interpreting similar "requirements" language in section 12 of the Noise Control Act, 42 U.S.C. § 4911, as meaning "relatively precise standards capable of uniform application"); *Department of Environmental Regulation v. Silvex Corp.*, 606 F.Supp. 159, 163-64 (M.D.Fla.1985) (giving similar interpretation to "requirements" in section 6001 of RCRA).

[7] MESS contends that because the state statutes involved in Counts 16 and 17 require the filing of reports, they are "procedural" rather than "substantive" and therefore the cases

In any event, this Court lacks jurisdiction over Counts 16, 17, 19, 20, and 21 because they do not allege violations of "effluent standards or limitations" as defined in section 505 of the Clean Water Act.

Section 505(a) of the Clean Water Act vests district courts with the following limited jurisdiction:

> Except as provided in subsection (b) of this section, and subsection 1319(g)(6) [CWA § 309(g)(6)] any citizen may commence a civil action on his own behalf –
>
> (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . .
>
> * * *
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order . . .

Thus, a district court's jurisdiction under section 505 is limited to the enforcement of an "effluent standard or

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defining the specificity necessary to be a substantive requirement are not applicable to those counts. Normally, a reporting requirement is procedural rather than substantive. Here, however, the obligation to file reports is triggered by substantive standards that are extremely vague, *i.e.*, discharges that "could affect the quality of the waters" or that constitute "change." Because these substantive standards do not themselves constitute "requirements," it follows that federal facilities cannot be required to file reports based upon those vague standards.

limitation under this chapter." That term is defined in section 505(f):

> For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title [CWA § 301(a)]; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title [CWA § 301 or 302]; (3) standard of performance under section 1316 of this title [CWA § 306]; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title [CWA § 307]; (5) certification under section 1341 of this title [CWA § 401]; *(6) a permit or condition thereof issued under section 1342 of this title [CWA § 402], which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title [CWA § 313];* or (7) a regulation under section 1345(d) of this title [CWA § 405(d)].

(Emphasis added.)

Thus, the only state law requirements that constitute enforceable effluent standards or limitations under section 505 are those that have been established administratively through the issuance of NPDES permits. This conclusion is supported by the legislative history of section 505. The Senate Report accompanying the 1972 amendments that included the private right of action under section 505 stated:

> Section 505 would not substitute a "common law" or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological [or] other

> considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

S.Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3745, 2 Leg.Hist. 1497.

In *State of New York v. United States*, the court concluded, based upon the above legislative history: "[I]t is clear that Congress intended that § 505 would create a private right of action only to enforce effluent limitations and standards that are administratively predetermined through NPDES permits." 620 F.Supp. at 384. *See also United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 979 (2d Cir.1984) (" '[a]uthority granted to citizens to bring enforcement actions under [section 505] is limited to effluent standard or limitations *established administratively* under the Act' " (emphasis in original) (*quoting* S.Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), U.S.Code Cong. & Admin. News 1972, pp. 3668, 3747); *Stream Pollution Control Board of Indiana v. United States Steel Corp.*, 512 F.2d 1036, 1041 (7th Cir.1975) (action to abate a nuisance is not actionable under section 505 since it is not an action commenced to require compliance with an effluent limitation, standard, or administrative order); *Town of North Hempstead v. Village of North Hills*, 482 F.Supp. 900, 904 (E.D.N.Y.1979) (action under section 505 "may only be maintained to enforce a previously promulgated effluent

standard or order of the Administrator of the EPA with respect to such a standard").

MESS relies upon the second part of the definition of "effluent standard or limitation" in section 505(f), which refers to "an effluent limitation or other limitation under section 1311 [CWA § 301] or 1312 [CWA § 302] of this title," in support of its position that the state provisions here fall within the scope of section 505. Section 301(b)(1)(C) requires the achievement of "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title [CWA § 510])." According to MESS, sections 505(f)(2) and 301(b)(1)(C) together mean that "[a]ny state water quality law or regulation is enforceable against a federal facility under the citizen suit provision." MESS Response at 40.

This Court disagrees with MESS' reasoning. First, the provisions involved in Counts 16, 17, 19, 20, and 21 are not water quality standards. The term "water quality standards" is defined in 40 C.F.R. § 131.3(i) as "provisiosn of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses."[8]

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[8] The Ninth Circuit described state water quality standards in *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1489 (9th Cir.1987):

> States establish water quality standards that specify the uses to be made of a body of water and the maximum levels of pollutants allowable in view of

The state provisions involved in Counts 16, 17, 19, 20, and 21 do not designate the uses of water nor do they designate water quality criteria based on such uses.

Second, even if the state provisions were water quality standards, the Ninth Circuit recently held in *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842, 850 (9th Cir.1987), that "it is not the water quality standards themselves that are enforceable in section 1311(b)(1)(C) [CWA § 301(b)(1)(C)], but it is the 'limitations necessary to meet' those standards, or 'required to implement' the standards." Because water quality standards themselves are not enforceable under section 301(b)(1)(C), they cannot be "effluent standards or limitations" under section 505(f)(2).

Third, EPA has implemented section 301(b)(1)C) through the NPDES program, by requiring that all NPDES permits include conditions necessary to achieve properly established state water quality standards. *See* 40 C.F.R. § 122.44(d)(1). Thus, if a state water quality standard has not been incorporated into an NPDES permit through an effluent limitation, it is outside the scope of section 301(b)(1)(C). Accordingly, a state water quality standard can constitute an effluent standard or limitation

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those uses. Water quality standards are designed to ensure the survival of wildlife in navigable waters and to protect recreational activities in and on the water. 33 U.S.C. § 1312(a) [CWA § 302(a)]. In contrast with technology-based standards, which are based on the feasibility of limiting effluent levels, water quality-based limitations relate to the environmental effects of different effluent levels.

enforceable under section 505 only if it has been incorporated into an NPDES permit.

Fourth, state water quality standards must go through an elaborate approval procedure under section 303 of the Clean Water Act before they can be implemented through the NPDES program. The requirements and procedures for developing, reviewing, revising and approving water quality standards are set forth in 40 C.F.R. Part 131. There is no indication that any of the state provisions involved in Counts 16, 17, 19, 20, and 21 have gone through this formal approval process.

Fifth, MESS' interpretations of section 505(f)(2) is at odds with the legislative history of section 505 and the decisions that have held that an "effluent standard or limitation" must be administratively established.[9]

Any doubt that citizen suits are limited to violations of NPDES permits where such permits exist is fully settled by section 402(k) of the Clean Water Act, which provides:

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of section . . . 1365 of this title [CWA § 505], with sections 1311 [CWA § 301], 1312 [CWA § 302], 1316 [CWA § 306], 1317 [CWA

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[9] One exception to the requirement that an effluent standard or limitation be administratively established is where a citizen suit alleges that a discharge of a pollutant is occurring without an NPDES permit. The definition of "effluent standard or limitation" in section 505(f)(1) includes "an unlawful act under subsection (a) of section 1311 of this title [CWA § 301(a)]." Section 301(a) specifically prohibits discharges of pollutants without permits.

> § 307], and 1343 [CWA § 404] of this title, except any standard imposed under section 1317 [CWA § 307] of this title for a toxic pollutant injurious to human health.

Under this provision, if a discharger is in compliance with the terms and conditions of an NPDES permit, the discharger is deemed to be in compliance with section 301 of the Clean Water Act for purposes of a citizen suit. Section 301, of course, contains the reference to water quality standards relied upon here by MESS. Section 402(k) therefore provides clear evidence that "effluent standard or limitation" as defined in section 505(f) is not intended to include state water quality standards that have not been incorporated into an NPDES permit.

Because Counts 16, 17, 19, 20, and 21 do not allege violations of effluent standards or limitations, and because the provisions in Counts 16, 17, 19(A), and 21 do not constitute "requirements," the Government's motion for summary judgment is granted and each of those counts is dismissed. Moreover, MESS' motion for summary judgment with respect to Count 16 is denied.

Count 18 – Water Code § 13376

Count 18 of the complaint alleges that McClellan has violated section 13376 of the California Water Code, which prohibits the "discharge of pollutants . . . except as authorized." MESS alleges that McClellan has not received authorization to discharge pollutants to groundwater, to channel runoff from the base into water courses on the base, or to discharge unpermitted pollutants through outfall pipes regulated by its NPDES permits. Count 18 is merely a restatement under state law of

Counts 14, 15, and 22. Accordingly, the same rulings reached with respect to those counts will also apply to Count 18. Thus, insofar as it relates to stormwater, Count 18 is dismissed for purposes of injunctive relief but not declaratory relief. Insofar as Count 18 relates to discharges to groundwater, the Government's motion for summary judgment is denied so that MESS can engage in additional discovery. And insofar as it relates to discharges of volatile organic compounds, Count 18 is dismissed.

Count 22 – CWA § 301 (Volatile Organic Compounds)

Count 22 alleges that McClellan has violated section 301 of the Clean Water Act by discharging certain volatile organic compounds through outfall 001 without a permit. In its motion for summary judgment, MESS also alleges that McClellan has discharged volatile organics through its stormwater collection system. MESS contends that because McClellan's NPDES permits do not specifically allow McClellan to discharge volatile organics, such discharges are prohibited under section 301. The Court disagrees.

The California Regional Water Quality Board is well aware that McClellan has discharged small amounts of volatile organics into navigable waters. In fact, the Board has specifically required McClellan to report such discharges on a monthly basis, and it is undisputed that McClellan has consistently complied with that requirement. Yet, the state has never imposed an effluent limitation on volatile organics in any NPDES permit issued to

McClellan. These facts combine to bring McClellan's discharges of volatile organics within the scope of its NPDES permit.

EPA's NPDES regulations, codified at 40 C.F.R. Part 122, contemplate that discharges of volatile organics will be addressed on a case-by-case basis. Section 122.21(g)(7)(ii) requires industrial permit applicants (such as McClellan) to report quantitative data for volatile organics in each outfall containing process wastewater. Section 122.42(a) requires permittees to notify the permitting authority as soon as they know or have reason to believe that an activity has occurred or will occur that would result in the discharge of a toxic pollutant "which is not limited in the permit" in excess of specified levels. These sections are specifically made applicable to state NPDES programs through 40 C.F.R. § 123.25.

As these provisions make clear, discharges of volatile organics are not automatically prohibited just because they are not specifically allowed in an NPDES permit. Rather, NPDES applicants and permittees are required by regulation to keep the permit authorities fully informed of any past or potential discharges of volatile organics, and those authorities then determine the appropriate treatment of the discharges. McClellan has fully complied with this regulatory scheme. Furthermore, the state has never established a ban or even an effluent limitation for volatiles in McClellan's discharges. Brunner Affidavit ¶ 13.[10]

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[10] The new NPDES permit issued to McClellan on September 25, 1987 continues the past practice of requiring regular

Under the circumstances, it is obvious that McClellan is not prohibited from discharging volatile organics. Accordingly, the Government's motion for summary judgment with respect to Count 22 is granted and MESS' corresponding motion for summary judgment is denied.

Count 23 – NPDES Permits and Related Orders

Count 23 alleges that McClellan has exceeded effluent limitations on discharges of total coliform, chemical oxygen demand, pH, dissolved oxygen, bioassay, biochemical oxygen demand, and phenol. MESS' memorandum in support of its motion for summary judgment (at 7-9) and its statement of material facts not in dispute (at 9-35) allege additional violations with respect to total suspended matter, suspended solids, lead, temperature, turbidity, chlorine, and total cyanide.

The cross-motions for summary judgment raise two distinct issues. The first issue is whether MESS is entitled to relief with respect to alleged violations that were not included in the notice of intent to sue that MESS sent to McClellan, the State, and EPA. The second issue is whether MESS is entitled to summary judgment with respect to the alleged violations of receiving water standards, as opposed to effluent limitations.

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monitoring and reporting of volatile organic discharges, but, as before, does not impose any limitations on such discharges. Brunner Affidavit, Attachment 9.

Violations Not Alleged in Notice of Intent to Sue

MESS did not provide notice of its intent to sue with respect to effluent limitations and receiving water standards for total suspended matter, suspended solids, lead, temperature, turbidity, chlorine, and total cyanide. The Government therefore argues that MESS is not entitled to relief with respect to those pollutants.

There is a split in the circuits regarding the consequences of a failure to give adequate notice of intent to sue prior to the commencement of a citizen suit under the environmental statutes. The First, Sixth, and Seventh Circuits have construed the notice provisions strictly and have concluded that the failure to provide adequate notice deprives district courts of subject matter jurisdiction. *See Garcia v. Cecos International, Inc.*, 761 F.2d 76, 79 (1st Cir.1985); *Walls v. Waste Resources Corp.*, 761 F.2d 311, 316 (6th Cir.1985); *City of Highland Park v. Train*, 519 F.2d 681, 691 (7th Cir.1975), *cert. denied*, 424 U.S. 927, 96 S.Ct. 1141, 47 L.Ed.2d 337 (1976). The Second, Third, Eighth, and District of Columbia Circuits, by contrast, have adopted a "pragmatic" approach to the notice provisions. Under this approach, so long as sixty days have elapsed before the district court takes action, formal compliance with the terms of the notice provisions is not required. *See Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 83-84 (2d Cir.1975); *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 243 (3d Cir.1980), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981); *Hempstead County & Nevada County Project v. EPA*, 700 F.2d 459, 463 (8th Cir. 1983); *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C.Dir. 1975).

The Ninth Circuit has recently sided with the courts that have taken a strict jurisdictional approach to the notice provisions. In *Hallstrom v. Tillamook County,* 831 F.2d 889 (9th Cir.1987), the Ninth Circuit determined that "proper notice" under the RCRA citizen suit provision "is a precondition of the district court's jurisdiction." 831 F.2d at 890. In so holding, the Court quoted approvingly the following passage from *Garcia v. Cecos Int'l, Inc.,* 761 F.2d at 78, 79.

> "The plain language of § 6972(b) [RCRA § 7002(b)] commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language.' . . . *The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will. . . . [I]t is part of the jurisdictional conferral from Congress that cannot be altered by the courts."*

831 F.2d at 891 (emphasis added). Although *Hallstrom* involved the RCRA citizen suit provision, its reasoning applies equally to the citizen suit provision in the Clean Water Act.

Even without *Hallstrom,* however, this Court would agree with those courts taking the jurisdictional approach. In this Court's view, concerns about sovereign immunity mandate that the will of Congress expressed in the notice provisions be particularly strictly enforced where the Federal government is the defendant in a citizen suit.[11]

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[11] MESS contends that it has "substantially complied" with the notice provisions because it gave sixty days notice of many

Accordingly, MESS' motion for summary judgment with respect to total suspended matter, suspended solids, lead, temperature, turbidity, chlorine, and total cyanide is denied.

Receiving Water Standards

McClellan's NPDES permits draw a distinction between "effluent limitations" and "receiving water limitations." *See, e.g.*, Order No. 87-160, Attachment 9 to Brunner Affidavit. Effluent limitations specifically limit the quantity or concentration of a pollutant that may appear in McClellan's discharges from particular point sources. With respect to these effluent limitations, the Government concedes that it is bound by any exceedances that it reports in its discharge monitoring reports. Receiver water limitations, by contrast, provide that "the discharge shall not cause" certain changes in the receiving waters or certain levels in the receiving waters to be exceeded. The Government therefore contends that McClellan's reports indicating that certain changes occurred in the receiving waters or that certain levels

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of the violations alleged in its complaint. However, MESS' complete failure to make any reference at all to alleged violations regarding total suspended matter, suspended solids, lead, temperature, turbidity, chlorine, and total cyanide simply cannot satisfy the requirement that a notice of intent to sue include sufficient information to permit the recipient to identify "the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation [and] the date or dates of such violation." 40 C.F.R. § 135.3(a).

were exceeded do not conclusively establish that the discharges "caused" those things to happen and therefore summary judgment in favor of MESS is inappropriate. The Court agrees.

McClellan's permits make it clear that receiving water standards constitute violations only if McClellan causes the change in water quality. McClellan's discharge monitoring reports do not indicate the "cause" of any of the alleged exceedances.

The Ninth Circuit's decision in *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480 (9th Cir.1987), is not to the contrary. In that case, the Ninth Circuit rejected Union Oil's defense based upon sampling errors and explained that self-monitoring reports constitute conclusive evidence of exceedances of permit limitations. Neither the Government nor this Court disagrees with the *Sierra Club* holding as far as it goes. But there is no indication that the violation with respect to which Union Oil raised the sampling error defense involved anything other than effluent limitations imposed at a particular point sources. Specifically, there is no reason to believe that Union Oil's defense pertained to receiving water standards that only prohibit a discharger from "causing" some change to occur. Moreover, the Government does not contend here that any of the information contained in McClellan's reports is erroneous; rather, it merely contends that those reports do not by themselves establish violations of the receiving water standards.

The Ninth Circuit also held in *Sierra Club* that as a matter of law Union Oil had violated the permit's prohibition on "creating conditions of visible oil in the receiving waters." *Id.* at 1491. MESS contends that such a prohibition is analogous to the receiving water standards in McClellan's permits. But Union Oil did not contend that it did not "cause" the visible oil in the receiving waters, nor did the five-day trial present any dispute on that fact. Rather, Union Oil made the legal argument that the permit's prohibition did not apply to receiving waters, but only to visible oil in San Pablo Bay. *Id.* The Ninth Circuit rejected this argument as a matter of law. Here, by contrast, the Government raises a factual issue regarding causation that cannot be rejected as a matter of law.

Accordingly, summary judgment is inappropriate at this time. By deferral of judgment on this issue, the Government will have an opportunity to develop and present evidence showing that its discharges did not cause the exceedances of receiving water standards.

Effluent Limitation Violations

The Government has conceded that McClellan exceeded effluent limitations for chemical oxygen demand, pH, and bioassay on certain dates. These exceedances are listed in Attachment 8 to the Brunner Affidavit. Summary judgment in favor of MESS is therefore granted with respect to the listed exceedances.

Attachment 8 does not list violations alleged by MESS that were not identified in its notice of intent to

sue. For the same reasons discussed earlier, the exceedances identified in the complaint but not in the notice of intent to sue are dismissed.

In addition, MESS concedes that the chemical oxygen demand limitation on cooling water discharges and the receiving water standard for phenol did not come into effect until July 1, 1985. Accordingly, Count 23 is dismissed insofar as it alleges violations of such limitations prior to July 1, 1985. The parties disagree, however, whether the effluent limitation on chemical oxygen demand was in effect between July 1, 1985 and August 8, 1986. Therefore, the portion of Count 23 allegeing violations of such limitation between those dates will be held open.

IT IS THEREFORE ORDERED THAT:

Based upon the above analysis, the Court decides the cross-motions for summary judgment as follows:

Count	Order
2	Government motion granted with respect to injunctive relief for cooling towers; in all other respects, Government motion denied; MESS motion denied.
3	Government Motion denied; MESS motion denied.
4	Government motion granted with respect to injunctive relief for cooling towers; in all other respects, Government motion denied; MESS motion denied.
5	Government motion granted with respect to waste drums; denied with respect to waste pits.

6 Government motion granted;
MESS motion denied.

8 Government motion granted;
MESS motion denied.

9 Government motion granted;

10 Government motion granted;
MESS motion denied.

11 Government motion granted.

12 Government motion granted except with respect to declaratory relief;
MESS motion denied.

13 Government motion granted except with respect to declaratory relief;
MESS motion denied.

14 Government motion granted except with respect to declaratory relief;
MESS motion denied.

15 Government motion denied;
MESS motion denied.

16 Government motion granted;
MESS motion denied.

17 Government motion granted.

18 Government motion granted with respect to volatile organic compounds; Government motion granted with respect to stormwater, except for declaratory relief; Government motion denied with respect to discharges to groundwater.

19 Government motion granted.

20 Government motion granted.

21 Government motion granted.

22 Government motion granted;
MESS motion denied.

23 Government motion granted with respect to alleged violations of chemical oxygen demand limitation on cooling water discharges prior to July 1, 1985; Government motion granted with respect to alleged violations of receiving water standard for phenol prior to July 1, 1985; Government motion granted with respect to alleged violations of effluent limitations not identified in notice of intent to sue; Government motion denied with respect to alleged violations of chemical oxygen demand on cooling water discharges between July 1, 1985 and August 8, 1986. MESS motion denied with respect to total suspended matter, suspended solids, lead, temperature, turbidity, chlorine, and total cyanide; MESS motion denied with respect to receiving water standards; MESS motion granted with respect to effluent limitations for chemical oxygen demand, pH, and bioassay on the dates listed in Attachment 8 to the Brunner Affidavit; MESS motion denied with respect to remaining alleged violation of effluent limitations.

McCLELLAN ECOLOGICAL SEEPAGE SITUATION (MESS), Mary Fisher, Charles and Sandy Yarbrough, Plaintiffs,

v.

Richard B. CHENEY, Secretary of the United States Department of Defense, Defendant.

Civ. No. S-86-0475-RAR.
United States District Court,
E.D. California.

Aug. 31, 1989.

Plaintiffs brought action under federal and state water quality and hazardous waste disposal laws for alleged violations by Air Force Base. On cross motions for summary judgment, the District Court, Ramirez, J., held that: (1) Resource Conservation and Recovery Act (RCRA) permit requirements did not apply to Base's inactive waste pits; (2) whether NPDES permit was required for alleged discharges to ground water was fact question; and (3) plaintiffs failed to state cause of action for review under Administrative Procedure Act.

Motions granted in part and denied in part.

Michael Axline, John E. Bonine, Western Natural Resources Law Clinic, Eugene, Or., Duane Miller, Miller & Rolfe, Sacramento, Cal., for plaintiffs.

Donald A. Carr, Acting Asst. Atty. Gen., Stephen L. Samuels, Asst. Chief, Environmental Defense Section, Land and Natural Resources Div., U.S. Dept. of Justice, Washington, D.C., David F. Levi, U.S. Atty., Yoshinori

H.T. Himel, Asst. U.S. Atty., Sacramento, Cal., for defendant.

MEMORANDUM OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

RAMIREZ, District Judge.

INTRODUCTION

This action arose on April 23, 1986, when plaintiffs McClellan Ecological Seepage Situation, Mary Fisher, and Charles and Sandy Yarbrough (hereinafter "MESS") filed a lawsuit seeking declaratory and injunctive relief as well as civil penalties against the Secretary of the Department of Defense under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6991i; the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387; California hazardous waste laws; and California water quality laws. The original complaint, which included twenty-three counts, alleged violations of those statutes by McClellan Air Force Base ("McClellan"), located in Sacramento, California.

On December 9, 1986, this Court granted the Government's motion to dismiss MESS' request for relief in the form of civil penalties. *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 655 F.Supp. 601 (E.D.Cal.1986). That determination was made based upon the Court's conclusion that neither the federal facilities provisions nor the citizen suit provisions of RCRA or the Clean

Water Act waived the United States sovereign immunity to civil penalties.[1]

In the summer and fall of 1987, the parties filed cross-motions for summary judgment with respect to the substantive claims in MESS' complaint. On June 20, 1988, this Court issued an opinion and order on those cross-motions. *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F.Supp. 1182 (E.D.Cal.1988). That decision dismissed large portions of the complaint and left other issues open for further factual development.

Meanwhile, on March 31, 1988, the Court granted a motion filed by MESS for leave to file an amended complaint in order to allege an additional cause of action under the Administrative Procedure Act ("APA") with respect to its claims alleging violations of state law.

Upon the completion of discovery, a second motion for summary judgment addressing the remaining issues in this case was filed by each party on November 22, 1988. After full briefing, oral argument on these motions was held on May 1, 1989. At the conclusion of the hearing, the Court announced its ruling from the bench. This memorandum opinion formalizes that bench ruling.

The issues addressed in the second round of summary judgment motions are as follows:

1. Whether any of McClellan's waste pits that are not covered by the facility's interim status under RCRA

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[1] By stipulation and order, Counts 1, 4(A), 7, and 19(C) of the complaint have been dismissed without prejudice. (Orders dated August 4, 1987 and September 25, 1987.)

have handled hazardous wastes in such a way that a RCRA permit is required with respect to those units.

2. Whether McClellan has discharged toxic wastes from waste pits into navigable waters of the United States in violation of section 301 of the Clean Water Act, 33 U.S.C. § 1311.

3. Whether MESS has a cause of action under the Administrative Procedure Act with respect to its claims that McClellan has violated various state statutory and regulatory provisions relating to management of solid waste and to water pollution.

4. Whether declaratory relief is appropriate with respect to issues that the Court previously dismissed on grounds of mootness or lack of subject matter jurisdiction under the citizen suit provisions of RCRA and the Clean Water Act.

5. Whether McClellan violated various effluent limitations and receiving water standards set forth in its NPDES permits and related orders.

This memorandum opinion will address each of these issues in turn.

I. APPLICABILITY OF RCRA PERMIT REQUIREMENTS TO McCLELLAN'S WASTE PITS

As discussed in the June 20, 1988 decision, the parts of Counts 2, 3, 4, and 5 of MESS' complaint that were not dismissed in that order involve a common question: whether McClellan is required to obtain a RCRA permit for hazardous waste units that have not actively handled

hazardous wastes since permitting requirements went into effect on November 19, 1980.

This Court agrees with the Government that a RCRA permit is not required with respect to treatment, storage, or disposal of hazardous wastes that occurred prior to November 19, 1980. Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), for example, specifically requires permits only for the management of hazardous wastes "after such date" that EPA's permit regulations take effect, *i.e.*, November 19, 1980. *See also* 53 Fed.Reg. 31,149 (Aug. 17, 1988) ("only facilities where hazardous waste is intentionally placed into land or water after November 19, 1980 require a RCRA disposal permit"); 45 Fed.Reg. 33,068 (May 19, 1980) ("[t]he Agency's intent is not to regulate under Subtitle C portions of facilities closed before the effective date of the regulations"); 45 Fed.Reg. 12,747 (Feb. 26, 1980) ("RCRA Subtitle C Regulations do not cover . . . abandoned sites").[2]

The question therefore arises whether McClellan treated, stored, or disposed of wastes in its waste pits after November 19, 1980. Throughout this litigation,

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[2] MESS' contention that the cited Federal Register notices refer only to units that were formally closed in accordance with the closure provisions in 40 C.F.R. Part 265, Subpart G, does not withstand scrutiny. Because these closure provisions were not in existence prior to November 19, 1980, EPA could not have been referring to formal closure requirements when it indicated that it did not intend to require RCRA permits for portions of facilities "closed before the effective date of the regulations." Furthermore, EPA expressly stated in its preamble of May 19, 1980 that permits were not required for inactive facilities or "inactive portions of active facilities." 45 Fed.Reg. 33,068.

MESS has contended that McClellan "stores" wastes in these waste pits. If "storage" has in fact occurred subsequent to November 1980, then such handling of wastes would require a RCRA permit. *See Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331 (4th Cir.1983); *Fishel v. Westinghouse Electric Corp.*, 640 F.Supp. 442 (M.D.Pa.1986).

The term "storage" is defined in RCRA as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." RCRA § 1004(33), 42 U.S.C. § 6903(33). EPA's implementing regulations define "storage" as "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed, or stored elsewhere." 40 C.F.R. § 270.2.

Here, the Government has presented uncontroverted evidence through the affidavit of Paul G. Brunner, the Deputy Director of the Environmental Management Directorate at McClellan Air Force Base, that "[w]aste placed in pits at McClellan was intended for permanent disposal" and that "[n]o disposal site at McClellan, not covered by interim status, has been used since November 19, 1980." Brunner Affidavit ¶ 7. MESS has made no attempt to refute these statements. Accordingly, this Court finds that the waste pits involved in Counts 2 through 5 of MESS' First Amended Complaint do not "store" hazardous wastes.

Lamphier and *Fishel* are inapposite. In each of those cases, the court found that there had been a temporary containment of materials accompanied by a subjective intent that at some time in the future there would be

permanent disposal of the hazardous waste. Here, however, there was never an intent by McClellan to do anything other than make a final disposition of the waste material in question.

The only activity that has occurred at any of the inactive waste pits at McClellan since November 19, 1980 relates to the Department of Defense's Installation Restoration Program ("IRP"). *See* Exec.Order No. 12,580, 52 Fed.Reg. 2923 (Jan. 29, 1987). Furthermore, McClellan Air Force Base has been listed by EPA on the National Priorities List pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675. That listing triggered an immediate requirement that McClellan, in consultation with EPA and appropriate state authorities, commence a remedial investigation and feasibility study for the facility under CERCLA § 120(e)(1). Remedial action at the facility occurs under the direct oversight of EPA and must meet standards that are at least as stringent as those existing under RCRA. McClellan is presently negotiating a comprehensive interagency agreement with EPA pursuant to CERCLA § 120(e)(2) to govern future remedial action at the base. The remedial action that is taken must, under section 121(d)(2)(A), attain all legally applicable standards, requirements, criteria, and limitations under all federal environmental laws, specifically including RCRA, the Safe Drinking Water Act, the Clean Air Act, the Clean Water Act, and the Marine Protection, Research and Sanctuaries Act, as well as all legally applicable standards, requirements, criteria, and limitations promulgated under state environmental and

federal siting laws that are more stringent than those imposed under federal law.

Section 121(e)(1) of CERCLA provides that "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section." 42 U.S.C. § 9621(e)(1). MESS' contention that McClellan's cleanup activities are not within the scope of section 121(e) are unconvincing for the reasons set forth in the Government's Memorandum in Opposition to Plaintiffs' Second Motion for Partial Summary Judgment at 7-9.

MESS mischaracterizes the Government's reliance on CERCLA § 121(e) when it states that "Defendant claims that hazardous waste pits on the base are exempted from RCRA's notification and permit requirements by section 121(e)." MESS Memorandum in Support of Second Motion for Partial Summary Judgment at 16. The Government has made it quite clear that it does not contend that section 121(e) "exempts" all activities involving treatment, storage, or disposal of hazardous wastes from RCRA permit requirements. On the contrary, where there has been treatment, storage, or disposal at a site since November 19, 1980, other than activities associated with a removal or remedial action under CERCLA, the Government acknowledges that a RCRA permit is required for that activity. Here, however, the only activity at the waste pits is in the context of remedial action taken under CERCLA. Section 121(e) expressly provides that that activity does not have to be separately permitted.

A question nevertheless remains as to whether the disposal of hazardous wastes in McClellan's waste pits requires a RCRA permit. "Disposal" is defined in RCRA as "the discharge, deposit, injection, dumping, spilling, *leaking*, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." RCRA § 1004(3), 42 U.S.C. § 6903(3) (emphasis added). MESS alleges that McClellan's waste pits require permits because they actively "leak" hazardous waste into groundwater.

Whether or not such alleged leaking constitutes handling of hazardous wastes requiring a RCRA permit appears to be an issue of first impression. The Court has not located any cases directly on point. Moreover, the legislative history and implementing regulations do not clearly state on their face whether RCRA permits are required for "leaking" from otherwise inactive disposal sites, although the term "disposal facility" is defined in 40 C.F.R. § 260.10 as "a facility or part of a facility at which hazardous waste is *intentionally* placed into or on any land or water . . . " (emphasis added).

Government counsel informed the Court at the May 1, 1989 hearing, however, that EPA does not require a RCRA permit with respect to leaking associated with a disposal unit where no treatment, storage, or disposal has occurred since November 19, 1980, unless the leaked material is itself actively handled in some way. *See* 53 Fed.Reg. 31,149 (Aug. 17, 1988) (discussing this issue in detail and concluding that "only facilities where hazardous waste is intentionally placed into land or water after

November 19, 1980 require a RCRA disposal permit"). EPA's position on this issue, as the agency charged with administering the RCRA permit program, is entitled to considerable deference. This Court must defer to that Agency's interpretation of RCRA unless it finds that the interpretation is in direct conflict with the express intent of Congress or is irrational. *See Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125, 105 S.Ct. 1102, 1107, 84 L.Ed.2d 90 (1985); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). This Court concludes that this approach is reasonable.

EPA has rationally construed the scope of its corrective action authorities under RCRA[3] to be broader than the scope of its permitting responsibilities. RCRA clearly establishes different scopes for these two different types of regulatory activities. The permitting program and the facility management standards in 40 C.F.R. Parts 264 and 265 are directed primarily at preventing releases of hazardous waste or constituents into the environment. The statute and EPA's regulations apply prospectively to treatment, storage, or disposal of hazardous waste that occurs after the effective date of the implementing regulations. The corrective action authorities, on the other hand, apply to releases of hazardous waste without regard to the date of any waste management activities. *See, e.g.*, section 3004(u) of RCRA, 42 U.S.C. § 6924(u) ("a permit . . . shall require corrective action for all releases

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[3] The corrective action provisions of RCRA include sections 3004(u), 3008(h), and 7003, 42 U.S.C. §§ 6924(u), 6928(h), and 6973. The Government acknowledges that federal facilities are subject to these provisions.

of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility seeking a permit under this [statute], *regardless of the time at which waste was placed in such unit"* (emphasis added)). EPA's distinction is also logical. Where hazardous waste is being released so as to threaten human health or the environment, EPA should be empowered to take necessary measures without regard to the management status of the unit containing the waste. Preventative management standards, on the other hand, are better candidates for prospective application.

The cases cited by MESS in its reply brief are not inconsistent with EPA's approach. In both *United States v. Waste Industries, Inc.*, 734 F.2d 159 (4th Cir. 1984), and *United States v. Price*, 523 F.Supp. 1055 (D.N.J.1981), the courts held that the inclusion of leaking within the definition of "disposal" authorized EPA to take corrective action under section 7003 of RCRA, 42 U.S.C. § 6973, with respect to imminent hazards caused by such leaking. These cases did not hold that RCRA permits were required for those same episodes of leaking.

Accordingly, summary judgment will be granted in favor of the Government with respect to those parts of Counts 2, 3, 4, and 5 that were not previously dismissed.

II. NECESSITY OF NPDES PERMIT FOR ALLEGED DISCHARGES TO GROUNDWATER

Count 15 of the First Amended Complaint alleges that McClellan is violating section 301 of the Clean Water Act by discharging hazardous substances from its waste pits to groundwater beneath the base without an NPDES

permit. Count 18 alleges that this same activity violates state law as well.

Section 301(a) provides that in the absence of a permit, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The term "discharge of a pollutant" is defined in section 502(12) as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "navigable waters," in turn, is defined in section 502(7) as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Accordingly, section 301(a) requires permits for the addition of pollutants from point sources to waters of the United States.

The Clean Water Act does not on its face indicate whether groundwater constitutes "waters of the United States." In the June 20, 1988 opinion, this Court held that based upon the structure of the Act, its legislative history, and the relevant case law, Congress did not intend to require NPDES permits for discharges of pollutants to isolated groundwater. At the same time, this Court concluded that permits might be required for discharges to groundwater that has a direct hydrological connection to surface waters that themselves constitute "waters of the United States." 707 F.Supp. at 1196. Accordingly, the Court denied the parties' first motions for summary judgment on Count 15 and allowed additional discovery as follows:

> MESS should be given the opportunity to engage in additional discovery to demonstrate a hydrological connection between the groundwater that lies below McClellan's waste pits and

> surface waters that themselves constitute "navigable waters." Only if MESS can show that discharges from the waste pits have an effect on surface waters of the United States can it prevail on Count 15. The mere fact that the groundwater might ultimately be consumed or might be used for irrigation purposes, as asserted by MESS, is not enough to bring the alleged discharges within the parameters of the NPDES program. Rather, MESS must establish that the groundwater is naturally connected to surface waters that constitute "navigable waters" under the Clean Water Act.

Id. at 1196.

Both parties subsequently retained experts for purposes of the "hydrological connection" issue. MESS' expert, Dr. Stephen K. Wheatcraft, an associate research professor at the Desert Research Institute in Reno, Nevada, submitted a report dated September 6, 1988. The Government's expert, Dr. David Keith Todd, president of David Keith Todd Consulting Engineers, Inc. in Berkeley, California, prepared a declaration, which was submitted by the Government in support of its second motion for summary judgment. Each party also deposed the other party's expert.

Not surprisingly, the two experts do not agree on all issues. Nevertheless, there does exist some common ground upon which this Court is prepared to make certain findings of fact. First, the experts agree that groundwater under McClellan Air Force Base is naturally connected to two surface bodies of water, the American River south of the Base and the Sacramento River west of the Base. Second, the experts agree that a "cone of

depression" presently exists due to heavy pumping by large consumers of groundwater, causing the groundwater in the vicinity of McClellan Air Force Base to move in a direction away from the American and Sacramento Rivers and generally toward the Base. This cone of depression has existed since at least 1968.[4] Third, the experts agree that in the absence of the cone of depression caused by heavy pumping of groundwater, groundwater beneath the Base would move generally in a southwesterly direction and some groundwater would eventually enter the American and/or Sacramento Rivers.

The parties disagree, however, as to the probability of any dissipation of the cone of depression in the vicinity of McClellan Air Force Base and the imminence and nature of any effects on surface waters if the cone of depression were to disappear. MESS contends that the cone of depression is "localized, temporary and artificial," Wheatcraft Report at 2, and that groundwater will soon reverse directions and flow once again into surface waters. The Government, on the other hand, contends that there is no basis to believe that there will be any reversal in the direction of groundwater flow in the foreseeable future, and that even assuming that the cone of depression were to suddenly disappear, it would take literally dozens, and perhaps hundreds, of years for any pollutants in the groundwater to reach surface waters.

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[4] Dr. Wheatcraft conceded during his deposition that there has been no flow of groundwater from beneath the Base into the rivers since at least 1968. Wheatcraft Deposition at 62, 66-67. Dr. Todd dates the cone of depression from at least 1965. Todd Declaration ¶¶ 1-2.

Based upon the parties' submissions, the Court finds that McClellan's waste pits do not presently discharge pollutants to the American River or the Sacramento River and have not done so since at least 1968, four years prior to the effective date of section 301 of the Clean Water Act. However, the Court is not ready to rule as a matter of law that an NPDES permit is not required for any discharges from the waste pits into groundwater.

The purpose of the Clean Water Act, of course, is to restore and maintain the integrity of our waterways. In view of that broad purpose, this Court is very much concerned that if it were to grant summary judgment in favor of the Government at this time, it might inadvertently send out a signal that even where there is a natural hydrological connection between groundwater and surface waters, a manmade or artificially created process that temporarily interrupts that hydrological connection can serve to negate the permitting requirements of the Clean Water Act. Accordingly, the Court has determined that MESS should have the opportunity to demonstrate through expert testimony that any seepage of pollutants from McClellan's waste pits into groundwater has a reasonably foreseeable and temporally imminent effect on surface waters of the United States.

Aside from the possible connection between the deep groundwater under McClellan Air Force Base and the American and Sacramento Rivers, MESS also alleges that pollutants from McClellan's waste pits are being discharged via a near-surface unsaturated zone into creeks that cross the Base. This allegation is based primarily on an eyewitness account by MESS' expert of "evidence of seepage from the near-surface unsaturated zone into the

drainage canals in several places." Wheatcraft Report at 6. The Government counters that even if such seepage exists, MESS has failed to make even a *prima facie* case that any pollutants from waste pits on the Base are being discharged into surface waters. In this regard, the Government has submitted affidavit testimony that the alleged locations of the seeps are both too near the surface and too far away from McClellan's waste sites to contain any contaminants from those sites.

This Court is of the opinion that MESS has presented sufficient evidence to survive a dismissal of its claim that McClellan is violating the Clean Water Act by allegedly discharging pollutants from waste pits through the near-surface unsaturated zone to the creeks that cross the Base. Because this issue ultimately turns on the facts, the Court believes that it is appropriate to give MESS an opportunity to present its case through testimony at a trial. However, as the plaintiff in this matter, MESS shall have both the burden of presenting evidence and the ultimate burden of persuasion that groundwater is being discharged to surface waters and that such groundwater contains contaminants from McClellan's waste pits.

In view of these determinations, both parties' motions for summary judgment on Count 15 and the related part of Count 18 of the complaint will be denied.

III. APA CLAIMS

As previously discussed, subsequent to this Court's dismissal of MESS' claims based upon state law at the conclusion of the February 8, 1988 hearing on the first round of summary judgment motions, MESS moved for

leave to file an amended complaint that alleged an additional cause of action based upon the judicial review provisions of the APA, 5 U.S.C. §§ 702 *et seq.* The Court granted that motion in an order dated March 31, 1988. MESS' claims under the APA apply to all counts of the complaint that allege violation of state law, specifically, Counts 6, 8, 9, 10, 11, 16, 17, 18, 19, 20, and 21.

The Government challenges MESS' APA claims on three separate procedural grounds: (i) the Court lacks jurisdiction under 28 U.S.C. § 1331 to review agency action that is alleged to violate state law; (ii) MESS lacks standing to raise claims under the APA because it has failed to demonstrate that it has incurred an injury-in-fact resulting from McClellan's purported failure to comply with state law; and (iii) MESS has failed to state a cause of action under the APA because the actions that MESS challenges do not constitute "agency action" within the meaning of the APA. In the alternative, the Government contends that MESS' state law claims should be denied on the merits.

This Court concludes that MESS has standing under the APA and that the Court has jurisdiction under 28 U.S.C. § 1331. However, the Court agrees with the Government that MESS has failed to allege a proper cause of action under the APA, and therefore Counts 6, 8, 9, 10, 11, 16, 17, 18, 19, 20, and 21 will be dismissed. Because those counts are being dismissed on procedural grounds, it is not necessary to reach the merits of MESS' allegations that McClellan has violated state law.

Of the three procedural challenges raised by the Government, the Court finds that the argument regarding

standing is the easiest to resolve. After the Government questioned the plaintiffs' standing in its second motion for summary judgment, MESS submitted affidavits executed by two of the individual plaintiffs. Those affidavits allege personal and financial harm resulting from McClellan's activities involving disposal of hazardous wastes and discharges to surface waters. The Court concludes that these allegations are sufficient to establish "injury in fact" under Article III of the United States Constitution. *See Port of Astoria, Or. v. Hodel*, 595 F.2d 467, 474 (9th Cir.1979).

Much more troublesome is whether this Court has subject matter jurisdiction to review alleged violations of state law. As the Supreme Court has held, the APA does not itself provide jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977). *See Oregon Natural Resources Council v. United States Forest Service ("ONRC")*, 834 F.2d 842, 852 n. 16 (9th Cir.1987). Consequently, jurisdiction must be based upon some other statute. Here, MESS alleges that federal question jurisdiction exists under 28 U.S.C. § 1331.[5] That statute provides:

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[5] MESS has also alleged that jurisdiction exists under the citizen suit provisions of RCRA, 42 U.S.C. § 6972(a), and the Clean Water Act, 33 U.S.C. § 1365. This Court held in the June 20, 1988 decision, however, that MESS' state law claims do not fall within the scope of the citizen suit provisions. Specifically, the Court held that it lacks jurisdiction under the RCRA citizen suit provision with respect to Counts 6, 8, 9, 10, and 11 because those counts involve obligations that did not "become effective pursuant to [RCRA]." 707 F.Supp. at 1191. Similarly, the Court held that it lacks jurisdiction under the Clean Water Act citizen suit provision with respect to Counts 16, 17, 19, 20, and 21 because those counts do not involve "effluent standards or

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

On its face, 28 U.S.C. § 1331 provides district courts with jurisdiction only with respect to civil actions that arise under *federal* law. The Government contends that Counts 6, 8, 9, 10, 11, 16, 17, 18, 19, 20, and 21 all arise under *state* law and therefore this Court lacks subject matter jurisdiction to render any relief with respect to those claims. MESS, on the other hand, contends that these claims arise under the federal facilities provisions of RCRA and the Clean Water Act, which provide generally that federal agencies engaged in solid waste management or discharges of pollutants are subject to state requirements.

The Court is inclined to agree with the Government's position but feels compelled by the Ninth Circuit's decision in *ONRC* to conclude that subject matter jurisdiction does exist here. In *ONRC*, an environmental organization sought to enjoin a timber company from harvesting timber pursuant to a sale awarded the company by the United States Forest Service ("USFS"). One aspect of the

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limitations." *Id.* at 1197. The only claim based upon state law with respect to which this Court did not previously hold that it lacks jurisdiction under the citizen suit provisions is Count 18. However, for the very reason that relief is potentially available under the citizen suit provision, relief under the APA with respect to Count 18 is precluded. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981); *Allegheny County Sanitary Authority v. United States Environmental Protection Agency*, 732 F.2d 1167, 1177 (3d Cir.1984); *City of Las Vegas, Nev. v. Clark County, Nev.*, 755 F.2d 697, 703 (9th Cir. 1985); *ONRC*, 834 F.2d at 851-52.

environmentalists' claim was that road building and timber harvesting associated with the timber sale allegedly violated Oregon state water quality standards and that USFS's alleged failure to comply with those standards violated the federal facilities provision of the Clean Water Act, 33 U.S.C. § 1323. 834 F.2d at 848. One of the issues before the Ninth Circuit was whether plaintiff's claim could be brought under either the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365, or the APA. The Government argued that the claim was improper on either basis. Specifically, with respect to the citizen suit provision, the Government maintained that the plaintiff had failed to provide the required sixty-day notice, 33 U.S.C. § 1365(b)(1), or, in the alternative, that the state water quality standards were not "effluent standard[s] or limitation[s]" as defined in the citizen suit provision, 33 U.S.C. § 1365(f). With respect to the APA, the Government argued that by enacting the citizen suit provision, Congress had intended to preclude actions under the APA alleging violations of the Clean Water Act.

The Ninth Circuit agreed with the Government that the citizen suit provision did not provide ONRC with a cause of action to challenge the Oregon water quality standards. Specifically, the Court held that those water quality standards were not "effluent standards or limitations" to the extent that they applied to "nonpoint" sources of discharges. 834 F.2d at 848-50. The Court went on to determine, however, that ONRC could challenge the alleged state water quality standard violations from nonpoint sources under the APA. In this regard, the Court concluded that the Clean Water Act citizen suit provision precluded remedies under other statutes only with

respect to limitations and standards that were enforceable under the citizen suit provision. 834 F.2d at 850-52. In other words, if the citizen suit provision does not provide a cause of action to a plaintiff, then other statutory bases for relief, such as the APA, continue to exist. Conversely, if relief is available under the citizen suit provision, then that relief is exclusive.

The Court's only reference in *ONRC* to subject matter jurisdiction occurred in a footnote, where the Court stated that "[f]ederal question jurisdiction is based on 28 U.S.C. § 1331." 834 F.2d at 852 n. 16. Apparently, the Government did not make the argument in *ONRC* that it makes here that allegations of violations of state law do not raise federal questions justiciable under 28 U.S.C. § 1331, nor did the Court address that issue *sua sponte*. In this case, the Government seeks to distinguish the court's assertion of jurisdiction in *ONRC* on the basis that the Ninth Circuit was of the view that the state water quality standards arose under federal law. While some support for that position can be found in *ONRC*, *see* 834 F.2d at 848, this Court is unwilling to make that inference about the Ninth Circuit's thought process.

Simply put, although it is prone to agree with the Government that federal question jurisdiction does not exist where violations of state law are alleged, this Court is not prepared to hold that subject matter jurisdiction does not exist in this case when the Court of Appeals for this Circuit has asserted such jurisdiction in similar circumstances. Rather, the Court of Appeals is the more appropriate forum for resolving this troublesome issue. In coming to this conclusion, this Court is mindful that the June 20, 1988 decision specifically rejected MESS'

contention that its state claims "arose under" the federal facilities provisions of RCRA and the Clean Water Act. 707 F.Supp. at 1191 n. 2. Similarly, were it not for *ONRC*, this Court would confidently hold that MESS' state law claims involve state law only and therefore there is no federal question subject matter jurisdiction under 28 U.S.C. § 1331. But this Court cannot simply ignore *ONRC*.

In any event, the Court does hold that MESS has failed to state a cause of action under the APA because the activities at McClellan Air Force Base that MESS challenges here do not constitute "agency action" as defined in the APA. The term "agency action" is defined at 5 U.S.C. § 551(13) as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." Here, MESS has indicated that the "agency action" that it is challenging consists of McClellan's alleged "failure to act" to comply with applicable state laws.

MESS obviously views an agency's "failure to act" as a class of agency action that is subject to judicial review under the APA no matter what the agency has failed to act upon. Under this theory, any omission by a government agency would be subject to judicial review. That position, however, is at odds with both the scope and purposes of the APA.

As its title indicates, the Administrative Procedure Act applies to administrative procedures, not to the day-to-day operations of a federal facility. Indeed, the definition of "agency action" refers to rules, orders, licenses, sanctions, and relief, all of which are administrative matters. Thus, common sense alone suggests that the phrase

"failure to act" in 5 U.S.C. § 551(13) refers to a failure to promulgate a rule, to issue an order, to grant a license, to impose a sanction, or to provide relief. There is simply no reasonable basis to think that Congress intended that affirmative agency actions be subject to review only if they involve administrative matters but that omissions to act be subject to review regardless of their context.

Two rules of statutory construction support the interpretation of the term "failure to act" as applying only to administrative matters. The first rule, known as *noscitur a sociis,* provides:

> If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases. Thus, when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word.

2A *Sutherland Statutory Construction* § 47.16 (4th ed. 1984) (footnotes omitted). A related maxim, known as *ejusdem generis,* provides:

> Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.

Id. § 47.17 (footnotes omitted). *See Nevada v. Herrington,* 827 F.2d 1394, 1400 (9th Cir.1987); *United States v. Bottoms,* 755 F.2d 1349, 1350 (9th Cir.1985). Under these principles of statutory construction, the phrase "failure to act" in

the definition of "agency action" must be read to refer to the same kind of actions specifically enumerated, *i.e.*, administrative actions.

In *ONRC*, the Ninth Circuit did not specifically address whether the action being challenged constituted an "agency action" within the meaning of 5 U.S.C. § 702. However, the action there was the reoffer of a timber sale by the United States Forest Service pursuant to 16 U.S.C. § 618(a)(5)(A). 834 F.2d at 845. Such a timber sale could constitute a "license" as defined in 5 U.S.C. § 551(8). Moreover, the Court in *ONRC* concluded that the reoffer constituted a "decision" within the meaning of 36 C.F.R. § 211.18(f)(1), which gave the plaintiff a right of administrative appeal. 834 F.2d at 846. The Forest Service's determination on that appeal could constitute an "order" as defined in 5 U.S.C. § 551(6).[6] Here, in sharp contrast, the "failure to act" that MESS is attempting to challenge under the APA is completely devoid of any of the characteristics of administrative procedure that are so clearly part of an agency rule, order, license, sanction, or relief.

The Court also notes the very different natures of the mandates of administrative agencies and the Department of Defense. The overriding purpose of the Defense Department is to preserve the peace, security, and integrity of the United States, not to make administrative decisions. The Air Force in particular must stand ready to

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[6] Similarly, the agency action challenged in *Parola v. Weinberger*, 848 F.2d 956 (9th Cir.1988), was the awarding of a procurement contract, a form of "license," for which the Ninth Circuit stated that "judicial review . . . is well established." *Id.* at 959.

overcome any aggressive act against the United States by foreign powers. Federal facilities are clearly subject to state-imposed requirements that fall within the scope of the federal facilities provisions of RCRA and the Clean Water Act. Moreover, the United States may be subject to the citizen suit provisions of those statutes for allegedly violating some of those requirements. However, this Court finds no evidence that Congress ever intended that McClellan's day-to-day activities as a *regulated* entity – as opposed to a *regulating* entity – be reviewable under the APA.

Accordingly, this Court concludes that MESS has failed to state a cause of action under the APA, and all the counts in the complaint alleging violation of state law, except Count 18, will be dismissed.[7]

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[7] MESS has no APA cause of action with respect to Counts 16, 17, 19A, and 21 for an additional reason as well. MESS seeks relief under 5 U.S.C. § 706 that would compel agency action "unlawfully" withheld and set aside agency action that is "not in accordance with law" or that is without observance of procedure "required by law." Obviously, if a particular law is not applicable to a defendant, a court cannot order the defendant to comply with that law under the APA. Here, the Court held in the June 20, 1988 decision that the state statutes and regulations involved in Counts 16, 17, 19A, and 21 are not "requirements" and therefore are not applicable to federal facilities pursuant to section 313 of the Clean Water Act, 33 U.S.C. § 1323. 707 F.Supp. at 1198. Accordingly, McClellan could not have acted unlawfully with respect to those state provisions and MESS has no basis for relief under the APA.

IV. AVAILABILITY OF DECLARATORY RELIEF

In the June 20, 1988 decision, this Court dismissed several portions of MESS' complaint on mootness grounds (Counts 2 and 4 to the extent that they involve cooling towers, Count 12, Count 14, and Court 18 to the extent that it relates to stormwater) or for lack of subject matter jurisdiction under section 505 of the Clean Water Act, 33 U.S.C. § 1365, because they involved allegations of violations that occurred entirely in the past (Count 12 and Count 13). The Court indicated, however, that it was dismissing these causes of action only with respect to injunctive relief. The Court left open the possibility that it would consider declaratory relief at a later time, and requested that the parties submit briefs on the issue of whether declaratory relief is appropriate. 707 F.Sup. at 1188. The Court now concludes that declaratory relief is not appropriate, for precisely the same reasons that injunctive relief is not appropriate.

The Declaratory Judgment Act requires that there be "a case of actual controversy" before declaratory relief can be granted by a court of the United states. 28 U.S.C. § 2201(a). The Ninth Circuit has held that declaratory relief should be denied " 'where it would serve no useful purpose.' " *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342-43 (9th Cir.) (citation omitted), *cert. denied*, 385 U.S. 919, 87 S.Ct. 229, 17 L.Ed.2d 143 (1966). That Court has recently stated:

> The question we must address is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between

> parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Central Montana Electric Power Cooperative v. Administrator of Bonneville Power Admin., 840 F.2d 1472, 1474 (9th Cir. 1988) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941)). Thus, "[t]here is no longer an actual controversy, and a declaratory judgment cannot be given, if a matter has become moot." 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2757, at 601 (2d ed. 1983). *See Enrico's Inc. v. Rice*, 730 F.2d 1250, 1255 (9th Cir. 1984) ("The same events that have mooted injunctive relief, persuade us that the case is also moot for purposes of declaratory relief. . . . ").

In addition to requiring an actual case or controversy, "[t]he Declaratory Judgment Act does not provide an independent jurisdictional basis for suits in federal court." *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983) (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-74, 70 S.Ct. 876, 878-80, 94 L.Ed. 1194 (1950)). Rather, that Act "only permits the district court to adopt a specific remedy when jurisdiction exists." 714 F.2d at 79. Moreover, "[i]f the court would lack jurisdiction of a coercive action against the United States because of sovereign immunity, it is equally without jurisdiction of a declaratory action against the United States." 10A C. Wright, A. Miller, & M. Kane, *supra*, § 2766, at 737. *See Covington County Bank v. R.J. Allen & Associates*, 389 F.Supp. 415, 416 (M.D.Ala.1975) (the Declaratory Judgment Act "provides no waiver of sovereign immunity").

Based upon these principles, it is clear that this Court cannot render declaratory relief with respect to MESS' claims that were previously dismissed for purposes of injunctive relief.

Counts 12 and 13 were previously dismissed for lack of subject matter jurisdiction. Because no separate jurisdictional basis exists for purposes of declaratory relief, this Court's prior determination that it lacks subject matter jurisdiction necessarily applies to declaratory relief as well as injunctive relief.

Similarly, the same circumstances that led the Court to hold that portions of Counts 2, 4 and 18 and all of Counts 12 and 14 are moot with respect to injunctive relief make declaratory relief moot as well.[8] Declaratory relief with respect to these causes of action " 'would serve no useful purpose.' " 362 F.2d at 343 (citation omitted). As this Court found in the June 20, 1988 decision, it is uncontested that there are no current violations at McClellan with respect to these counts and no reasonable

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[8] Portion of Counts 2 and 4 were found to be moot because McClellan "has not used treated wastewater in the cooling towers for nearly two years [and] [t]here is simply no reason to believe that McClellan has any intention of using treated wastewater in the cooling towers any time in the future." 707 F.Supp. at 1188. Count 12 was found to be moot because "McClellan now sends all of its domestic and industrial wastewater directly to the County waste treatment facility and no longer discharges any such wastewater to surface waters." *Id.* at 1192. Count 14 and part of Count 18 were found to be moot because McClellan's most recent NPDES permit expressly encompasses stormwater and because permits for industrial discharges consisting entirely of stormwater are not presently required. *Id.* at 1193, 1201.

expectation that there will be any violations in the future. Furthermore, even if MESS were to demonstrate that violations had occurred in the past, "there is no effective remedy this court can fashion for plaintiff." 730 F.2d at 1255. In short, "[t]here simply does not exist a substantial controversy 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *Id.* (quoting *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122, 94 S.Ct. 1694, 1698, 40 L.Ed.2d 1 (1974), and *Maryland Casualty Co.*, 312 U.S. at 273, 61, S.Ct. at 512).

Accordingly, the counts of the First Amended Complaint that were previously dismissed for purposes of injunctive relief but not declaratory relief will now be dismissed in their entirety.

V. NPDES ALLEGATIONS

Count 23 of the First Amended Complaint alleges that McClellan has violated various limitations set forth in its NPDES permits and related orders. These allegations involve two types of limitations: (i) effluent limitations, which regulate the amount or concentration of particular pollutants that may appear in McClellan's discharges; and (ii) receiving water standards, which limit the extent to which McClellan's discharges may change the quality of receiving waters. Unlike exceedances of effluent limitations, where McClellan's discharge monitoring reports may establish *per se* violations, exceedances of receiving water standards constitute violations only if McClellan's discharges actually *caused* the exceedances.

In the June 20, 1988 decision, this Court dismissed a large portion of Count 23 on the grounds that MESS had failed to mention the relevant allegations in its notice of intent to sue, as required by section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b). The allegations that were dismissed related to total suspended matter, suspended solids, lead, temperature, turbidity, chlorine, and total cyanide, and to a lesser extent, chemical oxygen demand, pH, and bioassay. For different reasons, the Court dismissed allegations involving the period prior to July 1, 1985 relating to the effluent limitation for chemical oxygen demand in cooling water discharges and the receiving water standard for phenol. The Court, however, granted summary judgment in favor of MESS with respect to certain violations of effluent limitations for chemical oxygen demand, pH, and bioassay that were admitted by the Government. The Court made no ruling with respect to the remaining allegations in Count 23.

The Government argues in its second motion for summary judgment that MESS' allegations relating to the effluent limitation for chemical oxygen demand for the period from July 1, 1985 through August 8, 1986 should be denied because no limitation was in effect during that period. In a supplemental brief filed shortly before the May 1, 1989 hearing in this matter, MESS conceded that the Government's position is correct. Accordingly, it is now appropriate to dismiss that part of Count 23 that alleges violations of the effluent limitation for chemical oxygen demand for the period July 1, 1985 through August 8, 1986.

In addition, the June 20, 1988 decision did not address alleged violations of (i) effluent limitations for

total coliform, phenol, and bioassay (except for those bioassay violations conceded by the Government or not mentioned in MESS' notice of intent to sue), and (ii) receiving water standards for pH and phenol. The government maintains that these allegations are now moot because McClellan's present NPDES permit does not regulate these pollutants.[9] MESS responds that even if these allegations are moot with respect to injunctive relief, the Court should nevertheless grant declaratory relief. The Court finds, however, that it is "absolutely clear" that McClellan will not commit any future violations of effluent limitations or receiving water standards that are no longer included in its NPDES permit. *See Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 66, 108 S.Ct. 376, 386, 98 L.Ed.2d 306 (1987). This conclusion is bolstered by the fact that McClellan no longer discharges any industrial wastewater, domestic wastewater, or cooling waters to surface waters. For the reasons discussed earlier, this finding of mootness applies with respect to both injunctive and declaratory relief. Accordingly, the alleged violations appearing in Count 23 involving effluent limitations for total coliform, phenol, and bioassay and receiving water standards for phenol and pH are dismissed.

As previously discussed, the June 20, 1988 decision granted summary judgment in favor of MESS with respect to certain allegations regarding the effluent limitation for pH that were admitted by the Government and its dismissed certain allegations that were not identified

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[9] McClellan's present NPDES permit applies only to discharges of cooling waters and strormwater and regulates only chemical oxygen demand, temperature, and pH.

in MESS' notice of intent to sue. The Court has now learned of six additional exceedances that were inadvertently omitted from the government's admissions. Those exceedances of the pH limitation occurred on January 31, 1984, from discharge points CW-2, CW-3, and CW-4; on March 11, 1984 from CW-5; and on August 8, 1982 and June 4, 1985 from outfall 002. Accordingly, summary judgment will be granted in favor of MESS with respect to these six allegations.

Finally, Count 23 alleges that McClellan violated the receiving water standard for dissolved oxygen. In the first round of summary judgment motions, the Government argued that McClellan's permits make it clear that exceedances of receiving water standards constitute violations only if McClellan's discharges actually cause the change in water quality. For example, the NPDES permits provide that McClellan's discharges may not cause the concentration of dissolved oxygen in receiving waters to fall below 5.0 mg/1. This Court agreed with the Government and therefore denied MESS' motion for summary judgment with respect to receiving water standards so that "the Government will have an opportunity to develop and present evidence showing that its discharges did not cause the exceedances of receiving water standards." 707 F.Supp. at 1204.

In the second round of summary judgment briefs, the Government attempts to meet the burden established by the June 20, 1988 decision by comparing the quality of surface waters coming onto McClellan Air Force Base to the quality of receiving waters after McClellan's discharges were added. With respect to 26 of the 107 separate violations of the receiving water standard for

dissolved oxygen alleged in Count 23, which cover the period January 15, 1981 through October 3, 1985, the Government contends that McClellan's discharge monitoring reports indicate that dissolved oxygen in the receiving waters was less than 5.0 mg/1 *before* McClellan's discharges were added. On many of these occasions, the Government notes, McClellan's discharges actually improved the concentration of dissolved oxygen in the receiving waters. The Government therefore specifically denies these 26 allegations. With respect to ten other allegations, the Government concedes that McClellan's discharge monitoring reports indicate that its discharge did in fact cause the concentration of dissolved oxygen to fall below 5.0 mg/1. The government therefore admits that violations occurred on these dates.[10] The Government points out that the remaining alleged violations occurred prior to the time that McClellan started monitoring the water quality of surface waters where they entered the Base. Nevertheless, the Government generally denies these allegations based upon the subsequent data indicating that McClellan's discharges usually were not the proximate cause of dissolved oxygen levels falling below 5.0 mg/1. MESS challenges the validity of McClellan's monitoring practices because they did not

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[10] The violations admitted occurred on January 10, April 4, April 18, April 23, and April 25, 1985 at Second Creek; on October 24, 1983 and September 12, 1984 at Magpie Creek; and on July 16, July 18, and July 23, 1985 at Arcade Creek. The Government specifically denies that a violation occurred on June 4, 1985 at Arcade Creek, as alleged by MESS, on the grounds that there was no discharge to Arcade Creek on that date.

necessarily measure the same molecules of water before and after McClellan's discharges were added.

This Court concludes that the proximate cause of the exceedances of the receiving water standard for dissolved oxygen between January 15, 1981 and October 3, 1985 is a triable issue of fact. Accordingly, the Court denies both parties' summary judgment motions on this portion of Count 23.[11]

IT IS THEREFORE ORDERED THAT:

Based upon the above analysis, the Court decides the second set of motions for summary judgment as follows:

Count	Order
2	Government motion granted; MESS motion denied.
3	Government Motion granted; MESS motion denied.
4	Government Motion granted; MESS motion denied.
5	Government Motion granted; MESS motion denied.
6	Government Motion granted; MESS motion denied.

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[11] The parties have informed the Court that they have agreed to the general terms of a settlement with respect to the dissolved oxygen issue and hope to formalize that agreement. In view of the Court's resolution of all other allegations in Count 23, it will not be necessary to address Count 23 at trial if the parties are able to reach an agreement with respect to the receiving water standard for dissolved oxygen.

8	Government Motion granted; MESS motion denied.
9	Government Motion granted.
10	Government motion granted; MESS motion denied.
11	Government motion granted;
12	Government Motion granted; MESS motion denied.
13	Government Motion granted; MESS motion denied.
14	Government Motion granted; MESS motion denied.
15	Government Motion granted; MESS motion denied.
16	Government motion granted.
17	Government motion granted.
18	Government motion granted with respect to declaratory relief for stormwater discharges; Government motion denied with respect to discharges to groundwater; MESS motion denied.
19	Government motion granted.
20	Government motion granted.
21	Government motion granted.
23	Government motion granted with respect to alleged violations of effluent limitation for chemical oxygen demand for the period July 1, 1985, through August 8, 1986; Government motion granted with respect to alleged violations of effluent limitations for total coliform, phenol, and bioassay (except for

bioassay allegations for which summary judgment was previously granted in favor of MESS); Government motion granted with respect to alleged violations of receiving water standards for pH and phenol; Government motion denied with respect to alleged violations of receiving water standard for dissolved oxygen; MESS motion denied except with respect to alleged violations of effluent limitation for pH specifically admitted by the Government and to alleged violations of receiving water standard for dissolved oxygen.

McClellan Ecological Seepage Situation v. Cheney

No. CIV S-86-475-RAR (E.D. Cal. Aug. 30, 1989)

On cross-motions for summary judgment in an environmental group's ongoing suit against the federal government and its California Air Force base concerning alleged environmental law violations, the court denies the environmental group's motions and both grants and denies in part the government's motions. The court first holds that a Resource Conservation and Recovery Act (RCRA) permit is not required for waste pits at the Air Force base in which hazardous wastes have been permanently disposed of since 1980. "Storage," as defined in the Environmental Protection Agency's (EPA's) RCRA regulations, only applies to the temporary holding of hazardous wastes and the evidence establishes that the government intended permanent disposal when it placed the waste into the pits. Moreover, no activity has occurred at any of the inactive waste pits since 1980 and the Air Force base has been listed by EPA on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court finds that the only activity at the waste pits is in the context of remedial actions taken under CERCLA, and §121(e) expressly provides that that activity does not have to be separately permitted. The court next holds that it must defer to EPA's interpretation of RCRA that no permit is necessary for leaking associated with a disposal unit where no treatment, storage, or disposal has occurred since 1980, unless the leaked material is itself actively handled.

The court finds that factual issues remain concerning whether the base is violating the Federal Water Pollution Control Act by discharging pollutants from the waste pits into groundwater without a National Pollution Discharge Elimination System permit. The environmental group should have the opportunity to demonstrate through expert testimony that any seepage into groundwater from the waste pits into groundwater has a reasonable foreseeable and temporally imminent effect on surface waters of the United States. The court next holds that the environmental group's Administrative Procedure Act (APA) counts must be dismissed, since the environmental group has failed to allege a proper cause of action under the APA. While the court holds that it has jurisdiction and the group has standing, the group has failed to state a cause of action under the APA by claiming that the government has failed to act. The activities at the Air Force base that the group challenges here do not constitute agency action as defined in the APA, since no reasonable basis exists to think Congress intended that omissions to act, which do not involve administrative matters, would be subject to review. The court next holds that declaratory relief is not appropriate for the environmental group's claims for which injunctive relief has already been denied. Finally, the court dismisses the environmental group's claims relating to the effluent limitation for chemical oxygen demand, since the group conceded that no limitation was in effect during that period. However, the court grants the environmental group's summary judgment motions concerning six exceedences that were inadvertently omitted from the government's admissions.

[Previous opinions in this litigation are published at 17 ELR 20344 and 19 ELR 20124. A subsequent decision appears at 20 ELR 20877].

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Ramirez, J.:

Opinion

Introduction

This action arose on April 23, 1986, when plaintiffs McClellan Ecological Seepage Situation, Mary Fisher, and Charles and Sandy Yarbrough (hereinafter "MESS") filed a lawsuit seeking declaratory and injunctive relief as well as civil penalties against the Secretary of the Department of Defense under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§6901-6991i; the Clean Water Act ("CWA"), 33 U.S.C. §§1251-1387; California

hazardous waste laws; and California water quality laws. The original complaint, which included twenty-three counts, alleged violations of those states by McClellan Air Force Base ("McClellan"), located in Sacramento, California.

On December 9, 1986, this Court granted the Government's motion to dismiss MESS' requirement for relief in the form of civil penalties. *McClellan Ecological Seepage Situation (MESS) v. Weinberger,* 655 F. Supp. 601 [17 ELR 20344] (E.D. Cal. 1986). That determination was made based upon the Court's conclusion that neither the federal facilities provisions nor the citizen suit provisions of RCRA or the Clean Water Act waived the United States' sovereign immunity to civil penalties.[1]

In the summer and fall of 1987, the parties filed cross-motions for summary judgment with respect to the substantive claims in MESS' complaint. On June 20, 1988, this Court issued an opinion and order on those cross-motions. *McClellan Ecological Seepage Situation (MESS) v. Weinberger,* 707 F. Supp. 1182 [19 ELR 20124] (E.D. Cal. 1988). That decision dismissed large portions of the complaint and left other issues open for further factual development.

Meanwhile, on March 31, 1988, the Court granted a motion filed by MESS for leave to file an amended complaint in order to allege an additional cause of action

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[1] By stipulation and order, Counts 1, 4(A), 7, and 19(C) of the complaint have been dismissed without prejudice. (Orders dates August 4, 1987 and September 25, 1987.)

under the Administrative Procedure Act ("APA") with respect to its claims alleging violations of state law.

Upon the completion of discovery, a second motion for summary judgment addressing the remaining issues in this case was filed by each party on November 22, 1988. After full briefing, oral argument on these motions was held on May 1, 1989. At the conclusion of the hearing, the Court announced its ruling from the bench. This memorandum opinion formalizes that bench ruling.

The issues addressed in the second round of summary judgment motions are as follows:

1. Whether any of McClellan's waste pits that are not covered by the facility's interim status under RCRA have handled hazardous wastes in such a way that a RCRA permit is required with respect to those units.

2. Whether McClellan has discharged toxic wastes from waste pits into navigable waters of the United States in violation of section 301 of the Clean Water Act, 33 U.S.C. §1311.

3. Whether MESS has a cause of action under the Administrative Procedure Act with respect to its claims that McClellan has violated various state statutory and regulatory provisions relating to management of solid waste and to water pollution.

4. Whether declaratory relief is appropriate with respect to issues that the Court previously dismissed on grounds of mootness or lack of subject matter jurisdiction under the citizen suit provisions of RCRA and the Clean Water Act.

5. Whether McClellan violated various effluent limitations and receiving water standards set forth in its NPDES permits and related orders.

This memorandum opinion will address each of these issues in turn.

I. Applicability of RCRA Permit Requirements to McClellan's Waste Pits

As discussed in the June 20, 1988 decision, the parts of Counts 2, 3, 4, and 5 of MESS' complaint that were not dismissed in that order involve a common question: whether McClellan is required to obtain a RCRA permit for hazardous waste units that have not actively handled hazardous wastes since permitting requirements went into effect on November 19, 1980.

This Court agrees with the Government that a RCRA permit is not required with respect to treatment, storage, or disposal of hazardous waste that occurred prior to November 19, 1980. Section 3005(a) of RCRA, 42 U.S.C. §6925(a), for example, specifically requires permits only for the management of hazardous wastes "after such date" that EPA's permit regulations take effect, *i.e.*, November 19, 1980. *See also* 53 Fed. Reg. 31,149 (Aug. 17, 1988) ("only facilities where hazardous waste is intentionally placed into land or water after November 19, 1980 require a RCRA disposal permit"); 45 Fed. Reg. 33,068 (May 19, 1980) ("[t]he Agency's intent is not to regulate under Subtitle C portions of facilities closed before the effective date of the regulations"); 45 Fed. Reg.

12,747 (Feb. 26, 1980) ("RCRA Subtitle C Regulations do not cover . . . abandoned sites").[2]

The question therefore arises whether McClellan treated, stored, or disposed of wastes in its waste pits after November 19, 1980. Throughout this litigation, MESS has contended that McClellan "stores" wastes in these waste pits. If "storage" has in fact occurred subsequent to November 1980, then such handling of wastes would require a RCRA permit. *See Environmental Defense Fund, Inc. v. Lamphier,* 714 F.2d 331 [13 ELR 21094] (4th Cir. 1983); *Fishel v. Westinghouse Electric Corp.,* 640 F.Supp. 442 [16 ELR 20634] (M.D. Pa. 1986).

The term "storage" is defined in RCRA as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." RCRA §1004(33), 42 U.S.C. §6903(33). EPA's implementing regulations define "storage" as "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed, or stored elsewhere:" 40 C.F.R. §270.2.

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[2] MESS' contention that the cited Federal Register notices refer only to units that were formally closed in accordance with the closure provisions in 40 C.F.R. Part 265, Subpart G, does not withstand scrutiny. Because these closure provisions were not in existence prior to November 19, 1980, EPA could not have been referring to formal closure requirements when it indicated that it did not intend to require RCRA permits for portions of facilities "closed before the effective date of the regulations." Furthermore, EPA expressly stated in its preamble of May 19, 1980 that permits were not required for inactive facilities or "inactive portions of active facilities." 45 Fed. Reg. 33,068.

Here, the Government has presented uncontroverted evidence through the affidavit of Paul G. Brunner, the Deputy Director of the Environmental Management Directorate at McClellan Air Force Base, that "[w]aste placed in pits at McClellan was intended for permanent disposal" and that "[n]o disposal site at McClellan, not covered by interim status, has been used since November 19, 1980." Brunner Affidavit ¶ 7. MESS has made no attempt to refute these statements. Accordingly, this Court finds that the waste pits involved in counts 2 through 5 of MESS' First Amended Complaint do not "store" hazardous wastes.

Lamphier and *Fishel* are inapposite. In each of those cases, the court found that there had been a temporary containment of materials accompanied by a subjective intent that at some time in the future there would be permanent disposal of the hazardous waste. Here, however, there was never an intent by McClellan to do anything other than make a final disposition of the waste material in question.

The only activity that has occurred at any of the inactive waste pits at McClellan since November 19, 1980 relates to the Department of Defense's Installation Restoration Program ("IRP"). *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987). Furthermore, McClellan Air Force Base has been listed by EPA on the National Priorities List pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§9601-9675. That listing triggered an immediate requirement that McClellan, in consultation with EPA and appropriate state authorities, commence a remedial investigation and feasibility study

for the facility under CERCLA §120(e)(1). Remedial action at the facility occurs under the direct oversight of EPA and must meet standards that are at least as stringent as those existing under RCRA. McClellan is presently negotiating a comprehensive interagency agreement with EPA pursuant to CERCLA §120(e)(2) to govern future remedial action at the base. The remedial action that is taken must, under section 121(d)(2)(A), attain all legally applicable standards, requirements, criteria, and limitations under all federal environmental laws, specifically including RCRA, the Safe Drinking Water Act, the Clean Air Act, the Clean Water Act, and the Marine Protection, Research and Sanctuaries Act, as well as all legally applicable standards, requirements, criteria, and limitations promulgated under state environmental and federal siting laws that are more stringent than those imposed under federal law.

Section 121(e)(1) of CERCLA provides that "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carries out in compliance with this section." 42 U.S.C. §9621(e)(1). MESS' contention that McClellan's cleanup activities are not within the scope of section 121(e) are unconvincing for the seasons set forth in the Government's Memorandum in Opposition to Plaintiffs' Second Motion for Partial Summary Judgment at 7-9.

MESS mischaracterizes the Government's reliance on CERCLA §121(e) when it states that "Defendant claims that hazardous waste pits on the base are exempted from RCRA's notification and permit requirements by section 121(e)." MESS Memorandum in Support of Second

Motion for Partial Summary Judgment at 16. The Government has made it quite clear that it does not contend that section 121(e) "exempts" all activities involving treatment, storage, or disposal of hazardous wastes from RCRA permit requirements. On the contrary, where there has been treatment, storage, or disposal at a site since November 19, 1980, other than activities associated with a removal or remedial action under CERCLA, the Government acknowledges that a RCRA permit is required for that activity. Here, however, the only activity at the waste pits is in the context of remedial action taken under CERCLA. Section 121(e) expressly provides that that activity does not have to be separately permitted.

A question nevertheless remains as to whether the disposal of hazardous wastes in McClellan's waste pits requires a RCRA permit. "Disposal" is defined in RCRA as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." RCRA §1004(3), 42 U.S.C. §6903(3) (emphasis added). MESS alleges that McClellan's waste pits require permits because they actively "leak" hazardous waste into groundwater.

Whether or not such alleged leaking constitutes handling of hazardous wastes requiring RCRA permit appears to be an issue of first impression. The Court has not located any cases directly on point. Moreover, the legislative history and implementing regulations do not clearly state on their face whether RCRA permits are required for "leaking" from otherwise inactive disposal

sites, although the term "disposal facility" is defined in 40 C.F.R. §260.10 as "a facility or part of a facility at which hazardous waste is *intentionally* placed into or on any land or water . . . " (emphasis added).

Government counsel informed the Court at the May 1, 1989 hearing, however, that EPA does not require a RCRA permit with respect to leaking associated with a disposal unit where no treatment, storage, or disposal has occurred since November 19, 1980, unless the leaked material is itself actively handled in some way. *See* 53 Fed. Reg. 31,149 (Aug. 17, 1988) (discussing this issue in detail and concluding that "only facilities where hazardous waste is intentionally placed into land or water after November 19, 1980 require a RCRA disposal permit"). EPA's position on this issue, as the agency charged with administering the RCRA permit program, is entitled to considerable deference. This Court must defer to that Agency's interpretation of RCRA unless it finds that the interpretation is in direct conflict with the express intent of Congress or is irrational. *See Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125, 105 S. Ct. 1102, 84 L. Ed. 2d 90 [15 ELR 20230] (1985); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 [14 ELR 20507] (1984). This Court concludes that this approach is reasonable.

EPA has rationally construed the scope of its corrective action authorities under RCRA[3] to be broader than

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[3] The corrective action provisions of RCRA include sections 3004(u), 3008(h), and 7003, 42 U.S.C. §§6924(u), 6928(h), and 6973. The Government acknowledges that federal facilities are subject to these provisions.

the scope of its permitting responsibilities. RCRA clearly establishes different scopes for these two different types of regulatory activities. The permitting program and the facility management standards in 40 C.F.R. Parts 264 and 265 are directed primarily at preventing releases of hazardous waste or constituents into the environment. The statute and EPA's regulations apply prospectively to treatment, storage, or disposal of hazardous waste that occurs after the effective date of the implementing regulations. The corrective action authorities, on the other hand, apply to releases of hazardous waste without regard to the date of any waste management activities. *See, e.g.*, section 3004(u) of RCRA, 42 U.S.C. §692(u) ("a permit . . . shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility seeking a permit under this [statute], *regardless of the time at which waste was placed in such unit*" (emphasis added)). EPA's distinction is also logical. Where hazardous waste is being released so as to threaten human health or the environment, EPA should be empowered to take necessary measures without regard to the management status of the unit containing the waste. Preventative management standards, on the other hand, are better candidates for prospective application.

The cases cited by MESS in its reply brief are not inconsistent with EPA's approach. In both *United States v. Waste Industries, Inc.*, 734 F.2d 159 [14 ELR 20461] (4th Cir. 1984), and *United States v. Price*, 523 F.Supp. 1055 [11 ELR 21047] (D.N.J. 1981), the courts held that the inclusion of leaking within the definition of "disposal" authorized EPA to take corrective action under section 7003 of

RCRA, 42 U.S.C. §6973, with respect to imminent hazards caused by such leaking. These cases did not hold that RCRA permits were required for those same episodes of leaking.

Accordingly, summary judgment will be granted in favor of the Government with respect to those parts of Counts 2, 3, 4, and 5 that were not previously dismissed.

II. Necessity of NPDES Permit for Alleged Discharges to Groundwater

Count 15 of the First Amended Complaint alleges that McClellan is violating section 301 of the Clean Water Act by discharging hazardous substances from its waste pits to groundwater beneath the base without an NPDES permit. Count 18 alleges that this same activity violates state law as well.

Section 301(a) provides that in the absence of a permit, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a). The term "discharge of a pollutant" is defined in section 502(12) as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). The term "navigable waters," in turn, is defined in section 502(7) as "waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). Accordingly, section 301(a) requires permits for the addition of pollutants from point sources to waters of the United States.

The Clean Water Act does not on its face indicate whether groundwater constitutes "waters of the United States." In the June 20, 1988, opinion, this Court held that

based upon the structure of the Act, its legislative history, and the relevant case law, Congress did not intend to require NPDES permits for discharges of pollutants to isolated groundwater. At the same time, this Court concluded that permits might be required for discharges to groundwater that has a direct hydrological connection to surface waters that themselves constitute "waters of the United States." 707 F. Supp. at 1196. Accordingly, the Court denied the parties' first motions for summary judgment on Count 15 and allowed additional discovery as follows:

> MESS should be given the opportunity to engage in additional discovery to demonstrate a hydrological connection between the groundwater that lies below McClellan's waste pits and surface waters that themselves constitute "navigable waters." Only if MESS can show that discharges from the waste pits have an effect on surface waters of the United States can it prevail on Count 15. The mere fact that the groundwater might ultimately be consumed or might be used for irrigation purposes, as asserted by MESS, is not enough to bring the alleged discharges within the parameters of the NPDES program. Rather, MESS must establish that the groundwater is naturally connected to surface waters that constitute "navigable waters" under the Clean Water Act.

Id. at 1196.

Both parties subsequently retained experts for purposes of the "hydrological connection" issue. MESS' expert, Dr. Stephen K. Wheatcraft, an associate research

professor at the Desert Research Institute in Reno, Nevada, submitted a report dated September 6, 1988. The Government's expert, Dr. David Keith Todd, president of David Keith Todd Consulting Engineers, Inc. in Berkeley California, prepared a declaration, which was submitted by the Government in support of its second motion for summary judgment. Each party also deposed the other party's expert.

Not surprisingly, the two experts do not agree on all issues. Nevertheless, there does exist some common ground upon which this Court is prepared to make certain findings of fact. First, the experts agree that groundwater under McClellan Air Force Base is naturally connected to two surface bodies of water, the American River south of the Base and the Sacramento River west of the Base. Second, the experts agree that a "cone of depression" presently exists due to the heavy pumping by large consumers of groundwater, causing the groundwater in the vicinity of McClellan Air Force Base to move in a direction away from the American and Sacramento Rivers and generally toward the Base. This cone of depression has existed since at least 1968.[4] Third, the experts agree that in the absence of the cone of depression caused by heavy pumping of groundwater, groundwater beneath the Base would move generally is a

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[4] Dr. Wheatcraft conceded during his deposition that there has been no flow of groundwater from beneath the Base into the rivers since at least 1968. Wheatcraft Deposition at 62, 66-67. Dr. Todd dates the cone of depression from at least 1965. Todd Declaration ¶¶1-2.

southwesterly direction and some groundwater would eventually enter the American and/or Sacramento Rivers.

The parties disagree, however, as to the probability of any dissipation of the cone of depression in the vicinity of McClellan Air Force Base and the imminence and nature of any effects on surface waters if the cone of depression were to disappear. MESS contends that the cone of depression is "localized, temporary and artificial," Wheatcraft Report at 2, and that groundwater will soon reverse directions and flow once again into surface waters. The Government, on the other hand, contends that there is no basis of believe that there will be any reversal in the direction of groundwater flow in the foreseeable future, and that even assuming that the cone of depression were to suddenly disappear, it would take literally dozens, and perhaps hundreds, of years for any pollutants in the groundwater to reach surface waters.

Based upon the parties' submissions, the Court finds that McClellan's waste pits do not presently discharge pollutants to the American River or the Sacramento River and have not done so since at least 1968, four years prior to the effective date of section 301 of the Clean Water Act. However, the Court is not ready to rule as a matter of law that an NPDES permit is not required for any discharges from the waste pits into groundwater.

The purpose of the Clean Water Act, of course, is to restore and maintain the integrity of our waterways. In view of that broad purpose, this Court is very much concerned that if it were to grant summary judgment in favor of the Government at this time, it might inadvertently send out a signal that even where there is a natural

hydrological connection between groundwater and surface waters, a manmade or artificially created process that temporarily interrupts that hydrological connection can serve to negate the permitting requirements of the Clean Water Act. Accordingly, the Court has determined that MESS should have the opportunity to demonstrate through expert testimony that any seepage of pollutants from McClellan's waste pits into groundwater has a reasonably foreseeable and temporally imminent effect on surface waters of the United States.

Aside from the possible connection between the deep groundwater under McClellan Air Force Base and the American and Sacramento Rivers, MESS also alleges that pollutants from McClellan's waste pits are being discharged via a near-surface unsaturated zone into creeks that cross the Base. This allegation is based primarily on an eyewitness account by MESS' expert of "evidence of seepage from the near-surface unsaturated zone into the drainage canals in several places." Wheatcraft Report at 6. The Government counters that even if such seepage exists, MESS has failed to make even a *prima facie* case that any pollutants from waste pits on the Base are being discharged into surface waters. In this regard, the Government has submitted affidavit testimony that the alleged locations of the seeps are both too near the surface and too far away from McClellan's waste sites to contain any contaminants from those sites.

This Court is of the opinion that MESS has presented sufficient evidence to survive a dismissal of its claim that McClellan is violating the Clean Water Act by allegedly discharging pollutants from waste pits through the near-surface unsaturated zone to the creeks that cross the Base.

Because this issue ultimately turns on the facts, the Court believes that it is appropriate to give MESS an opportunity to present its case through testimony at a trial. However, as the plaintiff in this matter, MESS shall have both the burden of presenting evidence and the ultimate burden of persuasion that groundwater is being discharged to surface waters and that such groundwater contains contaminants from McClellan's waste pits.

In view of these determinations, both parties' motions for summary judgment on Count 15 and the related part of Count 18 of the complaint will be denied.

III. APA Claims

As previously discussed, subsequent to this Court's dismissal of MESS' claims based upon state law at the conclusion of the February 8, 1988 hearing on the first round of summary judgment motions, MESS moved for leave to file an amended complaint that alleged an additional cause of action based upon the judicial review provisions of the APA, 5 U.S.C. §§702 *et seq.* The Court granted that motion in an order dated March 31, 1988. MESS' claims under the APA apply to all counts of the complaint that allege violation of state law, specifically, Counts 6, 8, 9, 10, 11, 16, 17, 18, 19, 20, and 21.

The Government challenges MESS's APA claims on three separate procedural grounds: (i) the Court lacks jurisdiction under 28 U.S.C. §1331 to review agency action that is alleged to violate state law; (ii) MESS lacks standing to raise claims under the APA because it has failed to demonstrate that it has incurred an injury-in-fact

resulting from McClellan's purported failure to comply with state law; and (iii) MESS has failed to state a cause of action under the APA because the actions that MESS challenges do not constitute "agency action" within the meaning of the APA. In the alternative, the Government contends that MESS' state law claims should be denied on the merits.

This Court concludes that MESS has standing under the APA and that the Court has jurisdiction under 28 U.S.C. §1331. However, the Court agrees with the Government that MESS has failed to allege a proper cause of action under the APA, and therefore Counts 6, 8, 9, 10, 11, 16, 17, 18, 19, 20, and 21 will be dismissed. Because those counts are being dismissed on procedural grounds, it is not necessary to reach the merits of MESS' allegations that McClellan has violated state law.

Of the three procedural challenges raised by the Government, the Court finds that the argument regarding standing is the easiest to resolve. After the Government questioned the plaintiffs' standing in its second motion for summary judgment, MESS submitted affidavits executed by two of the individual plaintiffs. Those affidavits allege personal and financial harm resulting from McClellan's activities involving disposal of hazardous wastes and discharges to surface waters. The Court concludes that these allegations are sufficient to establish "injury in fact" under Article III of the United States Constitution. *See Port of Astoria, Or. v. Hodel*, 595 F.2d 467, 474 [9 ELR 20252] (9th Cir. 1979).

Much more troublesome is whether this Court has subject matter jurisdiction to review alleged violations of

state law. As the Supreme Court has held, the APA does not itself provide jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977). *See Oregon Natural Resources Council v. United States Forest Service ("ONRC")*, 834 F.2d 842, 852 n.16 [18 ELR 20450] (9th Cir. 1987). Consequently, jurisdiction must be based upon some other statute. Here, MESS alleges that federal question jurisdiction exists under 28 U.S.C. §1331.[5] That statute provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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[5] MESS has also alleged that jurisdiction exists under the citizen suit provisions of RCRA, 42 U.S.C. §6972(a), and the Clean Water Act, 33 U.S.C. §1365. This Court held in the June 20, 1988 decision, however, that MESS' state law claims do not fall within the scope of the citizen suit provisions. Specifically, the Court held that it lacks jurisdiction under the RCRA citizen suit provision with respect to Counts 6, 8, 9, 10, and 11 because those counts involve obligations that did not "become effective pursuant to [RCRA]." 707 F. Supp. at 1191. Similarly, the Court held that it lacks jurisdiction under the Clean Water Act citizen suit provision with respect to Counts 16, 17, 19, 20, and 21 because those counts do not involve "effluent standards or limitations." *Id.* at 1197. The only claim based upon state law with respect to which this Court did not previously hold that it lacks jurisdiction under the citizen suit provisions is Count 18. However, for the very reason that relief is potentially available under the citizen suit provision, relief under the APA with respect to Count 18 is precluded. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 [11 ELR 20684] (1981); *Allegheny County Sanitary Authority v. United States Environmental Protection Agency*, 732 F.2d 1167, 1177 (3d Cir. 1984); *City of Las Vegas, Nev. v. Clark County, Nev.*, 755 F.2d 697, 703 [15 ELR 20353] (9th Cir. 1985); *ONRC*, 834 F.2d at 851-52.

On its face, 28 U.S.C. §1331 provides district courts with jurisdiction only with respect to civil actions that arise under *federal* law. The Government contends that Counts 6, 8, 9, 10, 11, 16, 17, 18, 19, 20, and 21 all arise under *state* law and therefore this Court lacks subject matter jurisdiction to render any relief with respect to those claims. MESS, on the other hand, contends that these claims arise under the federal facilities provisions of RCRA and the Clean Water Act, which provide generally that federal agencies engaged in solid waste management or discharges of pollutants are subject to state requirements.

The Court is inclined to agree with the Government's position but feels compelled by the Ninth Circuit's decision in *ONRC* to conclude that subject matter jurisdiction does exist here. In *ONRC*, an environmental organization sought to enjoin a timber company from harvesting timber pursuant to a sale awarded the company by the United States Forest Service ("USFS"). One aspect of the environmentalists' claim was that road building and timber harvesting associated with the timber sale allegedly violated Oregon state water quality standards and that USFS's alleged failure to comply with those standards violated the federal facilities provision of the Clean Water Act, 33 U.S.C. §1323. 834 F.2d at 848. One of the issues before the Ninth Circuit was whether plaintiff's claim could be brought under either the citizen suit provision of the Clean Water Act, 33 U.S.C. §1365, or the APA. The Government argued that the claim was improper on either basis. Specifically, with respect to the citizen suit provision, the Government maintained that the plaintiff had failed to provide the required sixty-day notice, 33 U.S.C. §1365(b)(1), or, in the alternative, that the state

water quality standards were not "effluent standard[s] or limitation[s]" as defined in the citizen suit provision, 33 U.S.C. §1365(f). With respect to the APA, the Government argued that by enacting the citizen suit provision, Congress had intended to preclude actions under the APA alleging violations of the Clean Water Act.

The Ninth Circuit agreed with the Government that the citizen suit provision did not provide ONRC with cause of action to challenge the Oregon water quality standards. Specifically, the Court held that those water quality standards were not "effluent standards or limitations" to the extent that they applied to "nonpoint" sources of discharges. 834 F.2d 848-50. The Court went on to determine, however, that ONRC could challenge the alleged state water quality standard violations from nonpoint sources under the APA. In this regard, the Court concluded that the Clean Water Act citizen suit provision precluded remedies under other statutes only with respect to limitations and standards that were enforceable under the citizen suit provision. 834 F.2d at 850-52. In other words, if the citizen suit provision does not provide a cause of action to a plaintiff, then other statutory bases for relief, such as the APA, continue to exist. Conversely, if relief is available under the citizen suit provision, then that relief is exclusive.

The Court's only reference in *ONRC* to subject matter jurisdiction occurred in a footnote, where the court stated that "[f]ederal question jurisdiction is based on 28 U.S.C. §1331." 834 F.2d at 852 n.16. Apparently, the Government did not make the argument in *ONRC* that it makes here that allegations of violations of state law do not raise federal questions justiciable under 28 U.S.C. §1331, nor

did the Court address that issue *sua sponte*. In this case, the Government seeks to distinguish the court's assertion of jurisdiction in *ONRC* on the basis that the Ninth Circuit was of the view that the state water quality standards arose under federal law. While some support for that position can be found in *ONRC*, *see* 834 F.2d at 848, this court is unwilling to make that inference about the Ninth Circuit's thought process.

Simply put, although it is prone to agree with the Government that federal question jurisdiction does not exist where violations of state law are alleged, this Court is not prepared to hold that subject matter jurisdiction does not exist in this case when the Court of Appeals for this Circuit has asserted such jurisdiction in similar circumstances. Rather, the Court of Appeals is the more appropriate forum for resolving this troublesome issue. In coming to this conclusion, this Court is mindful that the June 20, 1988 decision specifically rejected MESS' contention that its state claims "arose under" the federal facilities provision of RCRA and the Clean Water Act, 707 F. Supp. at 1191 n.2. Similarly, were it not for *ONRC*, this court would confidently hold that MESS' state law claims involve state law only and therefore there is no federal question subject matter jurisdiction under 28 U.S.C. §1331. But this Court cannot simply ignore *ONRC*.

In any event, the Court does hold that MESS has failed to state a cause of action under the APA because the activities at McClellan Air Force Base that MESS challenges here do not constitute "agency action" as defined in the APA. The term "agency action" is defined at 5 U.S.C. §551(13) as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or

denial thereof, or failure to act." Here, MESS has indicated that the "agency action" that it is challenging consists of McClellan's alleged "failure to act" to comply with applicable state laws.

MESS obviously views an agency's "failure to act" as a class of agency action that is subject to judicial review under the APA no matter what the agency has failed to act upon. Under this theory, any omission by a government agency would be subject to judicial review. That position, however, is at odds with both the scope and purposes of the APA.

As its title indicates, the Administrative Procedure Act applies to administrative procedures, not to the day-to-day operations of [a] federal facility. Indeed, the definition of "agency action" refers to rules, orders, licenses, sanctions, and relief, all of which are administrative matters. Thus, common sense alone suggests that the phrase "failure to act" in 5 U.S.C. §551(13) refers to a failure to promulgate a rule, to issue an order, to grant a license, to impose a sanction, or to provide relief. There is simply no reasonable basis to think that Congress intended that affirmative agency actions be subject to review only if they involve administrative matters but that omissions to act be subject to review regardless of their context.

Two rules of statutory construction support the interpretation of the term "failure to act" as applying only to administrative matters. The first rule, known as *noscitur a sociis*, provides:

> If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words

> may be determined by reference to their relationship with other associated words and phrases. Thus, when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word.

2A *Sutherland Statutory Construction* § 47.16 (4th ed. 1984) (footnotes omitted). A related maxim, known as *ejusdem generis,* provides:

> Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects enumerated by the preceding specific words.

Id. §47.17 (footnotes omitted). *See Nevada v. Herrington,* 827 F.2d 1394, 1400 [17 ELR 21188] (9th Cir. 1987); *United States v. Bottoms,* 755 F.2d 1349, 1350 (9th Cir. 1985). Under these principles of statutory construction, the phrase "failure to act" in the definition of "agency action" must be read to refer to the same kind of actions specifically enumerated, *i.e.,* administrative actions.

In *ONRC,* The Ninth Circuit did not specifically address whether the action being challenged constituted an "agency action" within the meaning of 5 U.S.C. §702. However, the action there was the reoffer of a timber sale by the United States Forest Service pursuant to 16 U.S.C. §618(a)(5)(A). 834 F.2d at 845. Such a timber sale could constitute a "license" as defined in 5 U.S.C. §551(8). Moreover, the Court in *ONRC* concluded that the reoffer constituted a "decision" within the meaning of 36 C.F.R.

§211.18(f)(1), which gave the plaintiff a right of administrative appeal. 834 F.2d at 846. The Forest Service's determination on that appeal could constitute an "order" as defined in 5 U.S.C. §551(6).[6] Here, in sharp contrast, the "failure to act" that MESS is attempting to challenge under the APA is completely devoid of any of the characteristics of administrative procedure that are so clearly part of an agency rule, order, license, sanction, or relief.

The Court also notes that very different natures of the mandates of administrative agencies and the Department of Defense. The overriding purpose of the Defense Department is to preserve the peace, security, and integrity of the United States, not to make administrative decisions. The Air Force in particular must stand ready to overcome any aggressive act against the United States by foreign powers. Federal facilities are clearly subject to state-imposed requirements that fall within the scope of the federal facilities provisions of RCRA and the Clean Water Act. Moreover, the United States may be subject to the citizen suit provisions of those statutes for allegedly violating some of those requirements. However, this Court finds no evidence that Congress ever intended that McClellan's day-to-day activities as a *regulated* entity – as opposed to a *regulating* entity – be reviewable under the APA.

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[6] Similarly, the agency action challenged in *Parola v. Weinberger*, 848 F.2d 956 [18 ELR 20882] (9th Cir. 1988), was the awarding of a procurement contract, a form of "license," for which the Ninth Circuit stated that "judicial review . . . is well established." *Id.* at 959.

Accordingly, this Court concludes that MESS has failed to state a cause of action under the APA, and all the counts in the complaint alleging violation of state law, except Count 18, will be dismissed.[7]

IV. Availability of Declaratory Relief

In the June 20, 1988 decision this Court dismissed several portions of MESS's complaint on mootness grounds (Counts 2 and 4 to the extent that they involve cooling towers, Count 12, Count 14, and Count 18 to the extent that it relates to stormwater) or for lack of subject matter jurisdiction under section 505 of the Clean Water Act, 33 U.S.C. §1365, because they involved allegations of violations that occurred entirely in the past (Count 12 and Count 13). The Court indicated, however, that it was dismissing these causes of action only with respect to injunctive relief. The Court left open the possibility that it would consider declaratory relief at a later time, and

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[7] MESS has no APA cause of action with respect to Counts 16, 17, 19A, and 21 for an additional reason as well. MESS seeks relief under 5 U.S.C. §706 that would compel agency action "unlawfully" withheld and set aside agency action that is not in accordance with law" or that is without observance of procedure "required by law." Obviously, if a particular law is not applicable to a defendant, a court cannot order the defendant to comply with that law under the APA. Here, the Court held in the June 20, 1988 decision that the state statutes and regulations involved in Counts 16, 17, 19A, and 21 are not "requirements" and therefore are not applicable to federal facilities pursuant to section 313 of the Clean Water Act, 33 U.S.C. §1323. 707 F. Supp. at 1198. Accordingly, McClellan could not have acted unlawfully with respect to those state provisions and MESS has no basis for relief under the APA.

requested that the parties submit briefs on the issue of whether declaratory relief is appropriate. 707 F.Supp. at 1188. The Court now concludes that declaratory relief is not appropriate, for precisely the same reasons that injunctive relief is not appropriate.

The Declaratory Judgment Act requires that there be "a case of actual controversy" before declaratory relief can be granted by a court of the United States. 28 U.S.C. §2201(a). The Ninth Circuit has held that declaratory relief should be denied " 'where it would serve no useful purpose.' " *McGraw-Edison Co. v. Performed Line Products Co.*, 362 F.2d 339, 342-43 (9th Cir.) (citation omitted), *cert. denied*, 385 U.S. 919, 87 S. Ct. 229, 17 L. Ed. 2d 143 (1966). That Court has recently stated:

> The question we must address is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Central Montana Electric Power Cooperative v. Administrator of Bonneville Power Admin., 840 F.2d 1472, 1474 (9th Cir. 1988) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L.Ed. 2d 826 (1941)). Thus, "[t]here is no longer an actual controversy, and a declaratory judgment cannot be given, if a matter has become moot." 10 A C. Wright, A Miller & M. Kane, *Federal Practice & Procedures* §2757, at 602 (2d ed. 1983). *See Enrico's Inc. v. Rice*, 730 F.2d 1250, 1255 (9th Cir. 1984) ("The same events that have mooted injunctive relief, persuade us the case is also moot for purposes of declaratory relief. . . . ").

In addition to requiring an actual case or controversy, "[t]he Declaratory Judgment Act does not provide an independent jurisdictional basis for suits in federal court." *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983) citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-74, 70 S. Ct. 876, 94 L.Ed. 1194 (1950)). Rather, that Act "only permits the district court to adopt a specific remedy when jurisdiction exists." 714 F.2d at 79. Moreover, "[i]f the court would lack jurisdiction of a coercive action against the United States because of sovereign immunity, it is equally without jurisdiction of a declaratory action against the United States." 10A C. Wright, A. Miller, & M. Kane, *supra*, §2766, at 737. *See Covington County Bank v. R.J. Allen & Associates*, 389 F. Supp. 415, 416 (M.D. Ala. 1975) (the Declaratory Judgment Act "provides no waiver of sovereign immunity").

Based upon these principles, it is clear that this Court cannot render declaratory relief with respect to MESS' claims that were previously dismissed for purposes of injunctive relief.

Counts 12 and 13 were previously dismissed for lack of subject matter jurisdiction. Because no separate jurisdictional basis exists for purposes of declaratory relief, this Court's prior determination that it lacks subject matter jurisdiction necessarily applies to declaratory relief as well as injunctive relief.

Similarly, the same circumstances that led the Court to hold that portions of Counts 2, 4, and 18 and all of Counts 12 and 14 are moot with respect to injunctive

relief make declaratory relief moot as well.[8] Declaratory relief with respect to these causes of action " 'would serve no useful purpose.' " 362 F.2d at 343 (citation omitted). As this Court found in the June 20, 1988 decision, it is uncontested that there are no current violations at McClellan with respect to these counts and no reasonable expectation that there will be any violations in the future. Furthermore, even if MESS were to demonstrate that violations had occurred in the past, "there is no effective remedy this court can fashion for plaintiff." 730 F.2d at 1255. In short, "[t]here simply does not exist a substantial controversy 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *Id.* (quoting *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974), and *Maryland Casualty Co.*, 312 U.S. at 273.

Accordingly, the counts of the First Amended Complaint that were previously dismissed for purposes of

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[8] Portion[s] of Counts 2 and 4 were found to be moot because McClellan "has not used treated wastewater in the cooling towers for nearly two years [and] [t]here is simply no reason to believe that McClellan has any intention of using treated wastewater in the cooling towers any time in the future" 707 F. Supp. at 1188. Count 12 was found to be moot because "McClellan now sends all of its domestic and industrial wastewater directly to the County waste treatment facility and no longer discharges any such wastewater to surface waters." *Id.* at 1192. Count 14 and part of Count 18 were found to be moot because McClellan's most recent NPDES permit expressly encompasses stormwater and because permits for industrial discharges consisting entirely of stormwater are not presently required. *Id.* at 1193, 1201.

injunctive relief but not declaratory relief will now be dismissed in their entirety.

V. NPDES Allegations

Count 23 of the First Amended complaint alleges that McClellan has violated various limitations set forth in its NPDES permits and related orders. These allegations involved two types of limitations: (i) effluent limitations, which regulate the amount or concentration of particular pollutants that may appear in McClellan's discharges; and (ii) receiving water standards, which limit the extent to which McClellan's discharges may change the quality of receiving waters. Unlike exceedances of effluent limitations, where McClellan's discharge monitoring reports may establish *per se* violations, exceedances of receiving water standards constitute violations only if McClellan's discharges actually *caused* the exceedances.

In the June 20, 1988 decision, this Court dismissed a large portion of Count 23 on the grounds that MESS had failed to mention the relevant allegations in its notice of intent to sue, as required by section 505(b) of the Clean Water Act, 33 U.S.C. §1365(b). The allegations that were dismissed related to total suspended matter, suspended solids, lead, temperature, turbidity, chlorine, and total cyanide, and to a lesser extent, chemical oxygen demand, pH, and bioassay. For different reasons, the Court dismissed allegations involving the period prior to July 1, 1985 relating to the effluent limitation for chemical oxygen demand in cooling water discharges and the receiving water standard for phenol. The Court, however, granted summary judgment in favor of MESS with

respect to certain violations of effluent limitations for chemical oxygen demand, pH, and bioassay that were admitted by the Government. The Court made no ruling with respect to the remaining allegations in Count 23.

The Government argues in its second motion for summary judgment that MESS' allegations relating to the effluent limitation for chemical oxygen demand for the period from July 1, 1985 through August 8, 1986 should be denied because no limitation was in effect during that period. In a supplemental brief filed shortly before the May 1, 1989 hearing in this mater, MESS conceded that the Government's position is correct. Accordingly, it is now appropriate to dismiss that part of Count 23 that alleges violations of the effluent limitation for chemical oxygen demand for the period July 1, 1985 through August 8, 1986.

In addition, the June 20, 1988 decision did not address alleged violations of (i) effluent limitations for total coliform, phenol and bioassay (except for those bioassay violations conceded by the Government or not mentioned in MESS's notice of intent to sue) and (ii) receiving water standards for pH and phenol. The government maintains that these allegations are now moot because McClellan's present NPDES permit does not regulate these pollutants.[9] MESS responds that even if these allegations are moot with respect to injunctive relief, the Court should nevertheless grant declaratory relief. The Court finds, however, that it is "absolutely clear" that

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[9] McClellan's present NPDES permit applies only to discharges of cooling waters and stormwater and regulates only chemical oxygen demand, temperature, and pH.

McClellan will not commit any future violations of effluent limitations or receiving water standards that are no longer included in its NPDES permit. *See Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, ___, 108 S. Ct. 376, 386, 98 L. Ed. 2d 306 [18 ELR 20142] (1987). This conclusion is bolstered by the fact that McClellan no longer discharges any industrial wastewater, domestic wastewater, or cooling waters to surface waters. For the reasons discussed earlier, this finding of mootness applies with respect to both injunctive and declaratory relief. Accordingly, the alleged violations appearing in Count 23 involving effluent limitations for total coliform, phenol, and bioassay and receiving water standards for phenol and pH are dismissed.

As previously discussed, the June 20, 1988 decision granted summary judgment in favor of MESS and with respect to certain allegations regarding the effluent limitation for pH that were admitted by the Government and it dismissed certain allegations that were not identified in MESS' notice of intent to sue. The Court has now learned of six additional exceedances that were inadvertently omitted for the Government's admissions. Those exceedances of the pH limitation occurred on January 31, 1984 from discharge points CW-2, CW-3, and CW-4; on March 11, 1984 from CW-5; and on August 8, 1982 and June 4, 1985 from outfall 002. Accordingly, summary judgment will be granted in favor of MESS with respect to these six allegations.

Finally, Count 23 alleges that McClellan violated the receiving water standard for dissolved oxygen. In the first round of summary judgment motions, the Government argued that McClellan's permits make it clear that

exceedances of receiving water standards constitute violations only if McClellan's discharges actually cause the change in water quality. For example, the NPDES permits provide that McClellan's discharges may not cause the concentration of dissolved oxygen in receiving waters to fall below 5.0 mg/l. This Court agreed with the Government and therefore denied MESS' motion for summary judgment with respect to receiving water standards so that "the Government will have an opportunity to develop and present evidence showing that its discharges did not cause the exceedances of receiving water standards." 707 F. Supp. at 1204.

In the second round of summary judgment briefs, the Government attempts to meet the burden established by the June 20, 1988 decision by comparing the quality of surface waters coming onto McClellan Air Force Base to the quality of receiving waters after McClellan's discharges were added. With respect to 26 of the 107 separate violations of the receiving water standard for dissolved oxygen alleged in Count 23, which cover the period January 15, 1981 through October 3, 1985, the Government contends that McClellan's discharge monitoring reports indicate that dissolved oxygen in the receiving water was less than 5.0 mg/l *before* McClellan's discharges were added. On many of these occasions, the Government notes, McClellan's discharges actually improved the concentration of dissolved oxygen in the receiving waters. The Government therefore specifically denies these 26 allegations. With respect to ten other allegations, the Government concedes that McClellan's discharge monitoring reports indicate that its discharges did in fact cause the concentration of dissolved oxygen to

fall below 5.0 mg/l. The Government therefore admits that violations occurred on these dates.[10] The Government points out that the remaining alleged violations occurred prior to the time that McClellan started monitoring the water quality of surface waters where they entered the Base. Nevertheless, the Government generally denies these allegations based upon the subsequent data indicating that McClellan's discharges usually were not the proximate cause of dissolved oxygen levels falling below 5.0 mg/l. MESS challenges the validity of McClellan's monitoring practices because they did not necessarily measure the same molecules of water before and after McClellan's discharges were added.

This Court concludes that the proximate cause of the exceedances of the receiving water standard for dissolved oxygen between January 15, 1981 and October 3, 1985 is a triable issue of fact. Accordingly, the Court denies both parties' summary judgment motions on this portion of Count 23.[11]

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[10] The violations admitted occurred on January 10, April 4, April 18, April 23, and April 25, 1985 at Second Creek; on October 24, 1983 and September 12, 1984 at Magpie Creek; and on July 16, July 18, and July 23, 1985 at Arcade Creek. The Government specifically denies that a violation occurred on June 4, 1985 at Arcade Creek, as alleged by MESS, on the grounds that there was no discharge to Arcade Creek on that date.

[11] The parties have informed the Court that they have agreed to the general terms of a settlement with respect to the dissolved oxygen issue and hope to formalize that agreement. In view of the Court's resolution of all other allegations in Count 23, it will not be necessary to reach an agreement with respect to the receiving water standard for dissolved oxygen.

IT IS THEREFORE ORDERED THAT:

Based upon the above analysis, the Court decides the second set of motions for summary judgment as follows:

Count	Order
2	Government motion granted; MESS motion denied.
3	Government motion granted; MESS motion denied.
4	Government motion granted; MESS motion denied.
5	Government motion granted; MESS motion denied.
6	Government motion granted; MESS motion denied.
8	Government motion granted; MESS motion denied.
9	Government motion granted.
10	Government motion granted; MESS motion denied.
11	Government motion granted.
12	Government motion granted; MESS motion denied.
13	Government motion granted; MESS motion denied.
14	Government motion granted; MESS motion denied.
15	Government motion denied; MESS motion denied.

16	Government motion granted.
17	Government motion granted.
18	Government motion granted with respect to declaratory relief for stormwater discharges; Government motion denied with respect to discharges to groundwater; MESS motion denied.
19	Government motion granted.
20	Government motion granted.
21	Government motion granted.
23	Government motion granted with respect to alleged violations of effluent limitation for chemical oxygen demand for the period July 1, 1985 through August 8, 1986; Government motion granted with respect to alleged violations of effluent limitations for total coliform, phenol, and bioassay (except for bioassay allegations for which summary judgment was previously granted in favor of MESS); Government motion granted with respect to alleged violations of receiving water standards for pH and phenol; Government motion denied with respect to alleged violations of receiving water standard for dissolved oxygen; MESS motion denied except with respect to alleged violations of effluent limitation for pH specifically admitted by the Government and to alleged violations of receiving water standard for dissolved oxygen.

McClellan Ecological Seepage Situation v. Cheney

No. S-86-475-RAR-JMF (E.D. Cal. Apr. 30, 1990)

The court holds that an environmental group has failed to prove that groundwater containing contaminants from hazardous waste pits on an Air Force base are being discharged into the surface water in violation of the Federal Water Pollution Control Act. The court, in finding that the seepage of pollutants from the Air Force base's waste pits into groundwater does not and will not have a reasonably foreseeable and imminent effect on surface waters of the United States, holds that appellant environmental group did not carry its dual burdens of proof and persuasion.

[Previous opinions in this litigation are published at 17 ELR 20344, 19 ELR 20124, and 20 ELR 20871.]

Counsel are listed at 20 ELR 20871.

Fitzgerald, J.:

Findings

This litigation dates from April 23, 1986, when McClellan Ecological Seepage Situation and others filed a complaint containing twenty-three claims against the Secretary of the Department of Defense.

United States District Judge Ramirez published an opinion and order December 9, 1986, granting the Secretary's motion to dismiss McClellan's Claim for civil penalties, 655 F. Supp. 601 (E.D. Cal. 1986). Then on June 20, 1988, Judge Ramirez published a memorandum opinion and order granting summary judgment for the Secretary

against a number of McClellan's claims for injunctive relief, 707 F. Supp. 1182; 1204, 1205 (E.D. Cal. 1988). Following the filing of an amended complaint by McClellan Ecological to add a claim for violations of state law under the Administrative Procedure Act, Judge Ramirez filed his memorandum opinion of August 31, 1989. Judge Ramirez in his 1989 memorandum opinion, found that McClellan's waste pits did not then discharge pollutants into the American River or into the Sacramento River and had not done so since at least 1968, which was four years prior to the effective date of §301 of the Clean Water Act. However, Judge Ramirez concluded that McClellan Ecological should have the opportunity to demonstrate through expert testimony that any seepage of pollutants from McClellan's waste pits into ground water has a "reasonably foreseeable and temporally imminent effect on surface waters of the United States." Judge Ramirez marked out an additional issue upon which McClellan was to be given an opportunity to offer evidence. He afforded McClellan Ecological the opportunity of presenting evidence to carry the "ultimate burden of persuasion that ground water is being discharged to surface water creeks crossing McClellan Air Force Base and that this ground water contains contaminants from McClellan waste pits." The issues reserved for trial by Judge Ramirez went to McClellan's claims of Count 15 and a related part of Count 18 in the complaint.

Apart from the issues which he reserved for trial, Judge Ramirez apparently granted the government's motion for summary judgment against all of McClellan Ecological's other claims. Since the time of his last memorandum Judge Ramirez has resigned to enter private

practice and the trial on the reserved issues was assigned to me. Evidence was taken on April 4 and concluded on April 6, 1990. Both Dr. Stephen W. Wheatcraft, who testified for McClellan Ecological and Dr. David Keith Todd, who testified for the federal defendants were qualified as expert witnesses.

I find:

Historical ground waters flowing below the City of Sacramento and its vicinity, including McClellan Air Force Base originated from sources east of Sacramento and moved in a westerly or southwesterly direction toward the Sacramento and American Rivers.

The natural direction of the ground water flow below McClellan Air Force Base and its vicinity began to show a significant change by 1955. Ground water flow was moving away from the Sacramento and American Rivers toward a cone of depression at a point where the surface level of ground water had been lowered by extraction of ground water for public or industrial use. Extraction of ground water now exceeds recharge by approximately 9000 acre feet a year.

A hydrological map prepared in 1989 reveals that the surface of the water in the cone of depression below McClellan Air Force Base has fallen below mean sea level to a depth of -30 feet. The bottom of the aquifer extends to a depth of 1500 feet and extraction of water is occurring from the upper level of the aquifer. The volume of ground water will permit extraction for present uses for many years.

The closing of many shallow water wells privately owned in the vicinity of McClellan Air Force Base is probably not due to contamination from the base, but is probably caused by local contamination related to widespread use of septic systems or septic tanks and by substances introduced into septic tanks to clear the tank.

It is improbable that contamination will bring about reduction of use or extraction of ground water in the vicinity of McClellan Air Force Base because the sources of contamination are from isolated areas. A remedial program to reduce contamination is now in place. A substantial amount of recharge to the ground water comes from uncontaminated sources of the Sacramento and American Rivers. It is probable that contamination of ground water beneath, or in the vicinity of McClellan Air Force Base will decrease in future years.

Several wells extracting ground water beneath the McClellan Air Force Base or in close proximity to the Base for Base use, or for public or industry use have been shut in due to contamination of the ground water. It is much more serious and indeed more probable that long before pollutants from any of McClellan's waste sites reach the Sacramento or American Rivers, that spreading contamination in ground water would jeopardize the use of the ground water by McClellan Air Force Base and by the public in Sacramento and its vicinity unless adequate remedial measures are taken.

I conclude that the seepage of pollutants from McClellan's waste pits into ground water does not now, nor will it have a "reasonably foreseeable and temporally imminent effect on surface waters of the United States,"

caused through contamination carried by ground water into the Sacramento or American Rivers.

Dr. Wheatcraft testified, and I find:

That on a visit to McClellan Air Force Base he saw evidence of a flowing seep and evidence of other seeps along the banks of a creek crossing the Base. He also observed discharge pipes which penetrated the gunite lining at places along the banks of the creek. The purpose of the pipes is to relieve back pressure on the gunite lining from accumulating water.

Dr. Wheatcraft testified, and I find:

That lens of relatively impermeable material underlie the ground surface at numerous places on McClellan Air Force Base. Water percolating through the soil will move horizontally when it meets a relatively impermeable layer of hardpan or clay and when more permeable soil above the lens became saturated. This shallow perched water had been located in several areas on the base and may constitute a potential pathway to carry pollutants into surface water of the creeks.

Dr. Wheatcraft's reasons for supporting his belief that the surface waters of creeks traversing McClellan Air Force Base receive contaminants from waste sites include the following:

Lens of hardpan or clays, underlie the surface of the ground at numerous places on McClellan Air Force Base, the discovery of perched water at several locations and the proximity of a number of waste sites to creeks crossing McClellan Air Force Base.

I find:

That in a technical memorandum and report of August 29, 1986, (exhibit 20) commenting upon a series of reports prepared by McLaren Environment Engineering, the senior waste management engineer at the Base informed Colonel Lowell the Director of Environmental Management, McClellan Air Force Base concerning waste site 38 which was identified in the vicinity of Building 475 on the Base. According to the engineer's report:

> Perched groundwater was encountered in four borings. This occurrence, whether from a broken distribution line from natural sources, suggest underlying impermeable strata which would accelerate lateral migration of contaminants away from the sources. If a distribution line has broken, the line should be remedied as fast as possible since it presents a threat to migration of contaminants which have been identified at this site.

The McLaren report of July, 1986, (exhibit 10) relating to site 38 disclosed that site 38 is an old reciprocating engine repair facility at Building 475. According to the report reportedly large quantities of carbon remover were used from the 1940's until mid 1960's. In addition Building 475 also contains a number of paint spray booths, tanks, pits and assorted sumps which may have contained or generated hazardous wastes.

McLaren Engineering completed 41 shallow auger profile borings in the vicinity of site 38 and found:

> Perched groundwater was encountered at a depth of one foot below grade in Boring 38SAP28, and at depth of two feet in 38SAP06

> and 38SAP29. A water sample was obtained from 38SAP29 and analyzed for VOC's. Chlorobenzene was detected at a concentration of 20 ppb. The soil sample boring 38SSB01 also encountered perched groundwater at a depth of five feet below grade and was subsequently terminated at a depth of 9.5 feet. A water sample was obtained from the zone of perched water and analyzed for VOC's. No volatile organic compounds were detected. The soil sample from 9.5 feet showed high concentrations of a variety of contaminants. The negative results of the water sample analysis from five feet may be explained by the fact that the boring, after encountering the perched water zone, penetrated a cemented soil layer. The soil sample was from below this cemented layer. The presence of water above the cemented layer may be due to a leaky underground water pipe, as is common around Building 475. 38SSB03 encountered a water main at a depth of five feet below grade and was discontinued.

(exhibit 10, page 40)

According to the McLaren report site 38 had been a surface site from which significant lateral migration of contaminants had occurred. Of the 5 sites in Area A, including site 38, only site 37 was found to contain buried waste. Building 473 is north of Building 475 and to the north of Building 473 is an open ditch. Perched water was found at depths of 1 and 2 feet in Borings 38SAP28, 38SAP06 and 38SAP29. However, at 38SAP25 north of Building 473 and the boring nearest to the ditch, no perched water was found. 38SAP06 is south of Building 473 and 38SAP29 and 38SAP28 are west of Building 475.

Perched water was also found 5 feet below the surface at the boring at 38SSB01 and boring 38SSB03 encountered a water main at 5 feet below ground and was discontinued. 38SSB01 is west of Building 473.

Site 3 as described in Exhibit 4, figure 28 is said to be close to Magpie Creek at a point where the creek crosses McClellan Air Force Base. Wastes found buried in Site 3 were generally moist or slightly moist except when perched water was encountered at the north end of the site soil beneath the wastes were not saturated. In the Hydrogeologic Assessment Report of Area C McClellan Air Force Base, prepared by the staff of Environmental and Earth Sciences for Area C (Exhibit N) mention was made of the perched unconfined and confined water bodies in Area C.

> There is some evidence of small, very limited, moist soil of perched ground water bodies below Area C (McLaren, 1986). These reported findings do not indicate a major perched water body or do they suggest much lateral extent to any of these small water bodies.

(exhibit N VIII-2)

According to Dr. Todd, and I find:

Extensive research has been done at McClellan Air Force Base to investigate the nature and extent of ground water supply and the extent of waste migration.

> Hundreds of boreholes have been drilled to monitor the nature and extent of the waste migration. Many of the potential waste sites on McClellan AFB have been investigated, and hundreds of soil borings have been made. Wells have been drilled off-site, and wells to the

> north, west, and south of McClellan AFB have been inventoried. Periodic sampling of the water and sediments from these wells have been performed. Thousands of chemical determinations have been made to quantify the wastes in time and space.
>
> These data and interpretation of the data are available in more than 130 reports prepared by the Radian Corporation, McLaren Environmental Engineering, Metcalf & Eddy Engineers, J.H. Kleinfelder and Associates, S.S. Papadopulos and Associates, Inc., Luhdorff and Scalmanini, Consulting Engineers, Engineering Science CHZM Hill, some U.S. Air Force reports, and some U.S. Geological Survey reports. These reports are on file at McClellan AFB, and copies have been furnished to appropriate state and Federal agencies.

(exhibit IV VIII-14)

Dr. Todd also testified, and I find:

That research indicates one source of contaminated perched water, but no evidence of lateral migration of contaminants into surface waters from waste sites on McClellan AFB into surface waters on the Base.

Although some of the contaminations sites, or potentially contamination sites, are close by surface water channels on the Base, it is necessary to determine the depth at which contamination is found, since if the contamination is below the bottom of the channel it will not enter the surface waters in the channel.

Horizontal movement of contaminated material by water is probable because of underlying lens of clay or

hardpan, but the depth size and the location of the lens, the amount of permeable material, and the amount of water required to saturate the permeable material are all factors which will affect the extent of lateral and vertical movement of the contamination.

I find:

That McClellan Ecological has failed to prove by persuasive evidence that perched ground water containing contaminants from waste sites on McClellan Air Force Base are presently discharged into the surface water of creeks crossing the Base.

I conclude that McClellan Ecological Seepage has failed to carry its burden of proof and failed to carry "the ultimate burden of persuasion that ground water is being discharged to surface water [creeks] and that such ground water contains contaminants from McClellan waste pits.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MCCLELLAN ECOLOGICAL SEEPAGE SITUATION; MARY FISHER; CHARLES YARBROUGH,	)	CA No. 91-16467/ 91-16308
Plaintiffs-Appellees, Cross-Appellees,	)	DC No. CV-86-00475-RAR
v.	)	
LES ASPIN,* Secretary of the United States Department of Defense	)	ORDER (Filed Jul. 8, 1993)
Defendant-Appellant. Cross-Appellant.	)	

BEFORE: SNEED, ALARCON and CANBY, Circuit Judges

This appeal arises from a citizen's suit under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, and the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, against the Secretary of Defense. After a series of proceedings the district court rejected claims that the Secretary violated those statutes in conducting waste management activities at McClellan Air Force Base near Sacramento, California.

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* Les Aspin is substituted for his predecessor, Dick Cheney, as Secretary of the United States Department of Defense Fed. R. App. P. 43(c)(1).

In support of the district court's judgment, the Secretary raises a threshold jurisdictional argument[1] for the first time on appeal. He contends that Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9613(h), denies federal courts authority to entertain claims related to abandoned waste sites at McClellan because the Air Force has adopted a plan to clean up those sites. Section 113(h) provides:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following: [then are listed five actions under sections of CERCLA].

42 U.S.C. § 9613(h). The government argues that the purpose of this section is to prevent interference, in the form of other judicial challenges, with CERCLA cleanup actions. *See Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir.), *cert. denied*, 111 S. Ct. 509 (1990); *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1018-24 (3d Cir. 1991). The government contends that many of MESS's claims under the Resource Conservation and Recovery Act, the Clean

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[1] The Secretary also renews his motion to dismiss the appeal as untimely. We deny the motion for reasons to be explained in our final disposition of the appeal.

Water Act, and state law, seek relief that would interfere with the government's cleanup activities that comprise its CERCLA compliance program.

We are unable on the present record to resolve this jurisdictional issue. Very little information about the progress and scope of the government's plan, the Installation Repair Program (IRP), was presented to the district court.[2] We consequently cannot determine whether federal jurisdiction exists over the abandoned waste site claims.

We therefore remand the case to the district court for 120 days with instructions to augment the record and determine, in the first instance, whether the court lacks jurisdiction over any of MESS's claims because they represent "challenges to removal or remedial action" taken pursuant to CERCLA of the type that federal courts are forbidden by section 113(h) to entertain.

REMANDED WITH INSTRUCTIONS.

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[2] Plaintiff introduced two exhibits, excerpts of documents prepared for the Air Force by two environmental assessment firms, which discussed the IRP tangentially. The table of contents listing for each document suggests that a complete version of them might yield useful information on the program. The most recent of these documents was prepared in September, 1988. Nothing in the record provides us with information on the progress, or lack of progress, of the IRP since that time.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

McCLELLAN ECOLOGICAL SEEPAGE SITUATION (MESS); et al.,

Plaintiffs,

v.

LES ASPIN, SECRETARY OF THE DEPARTMENT OF DEFENSE; et al.,

Defendants.

NO. CIV. S-86-475-WBS
(CA No. 91-16467/91-16308)

FINDINGS AND DETERMINATION RE: JURISDICTION

On April 23, 1986, McClellan Ecological Seepage Situation ("MESS") filed a complaint against the Secretary of the Department of Defense based on alleged violations by McClellan Air Force Base ("MAFB") of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k; the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387; the California Health and Safety Code; and the California Fish and Game Code. MESS sought declaratory relief, injunctive relief and civil penalties.

In four separate decisions, Judge Ramirez of this court denied MESS's claims. *See McClellan Ecological Seepage Situation v. Weinberger,* 655 F.Supp. 601 (E.D. Cal. 1986); *McClellan Ecological Seepage Situation v. Weinberger,* 707 F.Supp. 1182 (E.D. Cal. 1988); *McClellan Ecological Seepage Situation v. Cheney,* 763 F.Supp. 431 (E.D. Cal. 1989); *McClellan Ecological Seepage Situation v. Cheney,* 20

Envtl. L. Rep. (Envtl. L. Inst.) 20,870 (E.D. Cal. 1990). MESS appealed.

On appeal, the government raised for the first time a threshold jurisdictional issue, arguing that § 113 (h) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9613(h), denies federal courts jurisdiction to entertain MESS's challenge to the CERCLA cleanup underway at MAFB. The government contends that the purpose of § 113(h) is to prevent interference, in the form of judicial challenges, with CERCLA cleanup actions. MESS's claims under RCRA, CWA, and state law, according to the government, seek relief that would result in such an interference.

On July 8, 1993, the Ninth Circuit remanded the case to this court with instructions to augment the record by determining the "progress and scope" of the cleanup at MAFB[1] and to determine in the first instance whether § 113(h) precludes review of MESS's claims. The above two issues are presently before the court.

The parties have augmented the record regarding the progress and scope of the MAFB cleanup by submitting: the MAFB Interagency Agreement ("IAG"), which describes itself as "an amended federal facility agreement under CERCLA section 120" (Exh. A to Ierardi Decl.); a

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[1] The Ninth Circuit noted that MESS introduced two exhibits, excerpts of documents prepared for the Air Force by two environmental assessment firms, discussing tangentially the Installation Restoration Program ("IRP"). The court explained that the most recent of the documents was dated September of 1988 and that neither provided information on the progress, or lack thereof, of the IRP since that date.

list of deadlines previously established, Exh. A to IAG; the Comprehensive CERCLA Workplan ("CCW") Outline (Exh. B. to IAG); Map of Federal Facility (Attachment A); a list of Chemicals of Concern (Attachment B); Statement of Facts (Attachment C); List of Primary Documents and Documents Under Review (Attachment D); Installation Restoration Program Activities (Attachment E); MAFB Management Action Plan ("MAP"), dated July, 1993; Remedial Response Program Description (Appendix A1 to MAP); Confirmed Sites and Potential Release Locations Inventory and Status (Appendix A2 to MAP); Response to Comments on the CCW (Appendix B1 to MAP), Response to Comments on the Soils Management Plan (Appendix B2 to MAP); Soil Management Plan; Technical Review Committee Meeting Minutes (Exh. D); Notice of Final Permit Decision under RCRA, dated May 4, 1990, and Final Hazardous Waste Facility Permit for MAFB; MAFB Community Relations/Public Participation Plan (Exh. F).[2]

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[2] Other documents submitted include: two declarations from Mario Ierardi, Chief, Environmental Restoration Division of the Environmental Management Directorate, Sacramento Air Logistics Center, MAFB, whose duties include managing the MAFB cleanup and monitoring compliance with the IAG; the declaration of Mark Malinowski, Associate Engineering Geologist at the California EPA, Department of Toxic Substances Control; letter from Mark J. Klaiman, Assistant Regional Counsel, EPA Region IX, to Renee Collier, Environmental Law and Litigation Division, U.S. Air Force; affidavit of Monica Kirk, Chief of Hazardous Waste Section 1, EPA Region X; National Priorities List Proposed Sites by State, June 1993; Federal Facilities Agreement under CERCLA § 120 between EPA, Oregon Department of Environmental Quality, and the U.S. Army and related documents; EPA Model IAG Language; Memorandum from J. Winston Porter regarding Enforcement Actions Under RCRA and

I. STANDARD

The party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936). When resolving disputed jurisdictional facts, the court may review any evidence, including affidavits and testimony. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989). No presumptions of truthfulness apply to allegations of jurisdictional facts. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill*, 594 F.2d at 733).

II. THE RELEVANT STATUTES

As this case concerns the intersection of three federal environmental statutes – RCRA, Pub.L. No. 94-580, 90 Stat. 2795, as amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6981); CERCLA, Pub. L. No. 96-510, 94 Stat. 2767, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100

CERCLA at Federal Facilities; Memorandum from Lisa K. Friedman regarding RCRA post-closure permit requirements at CERCLA sites; MESS's original complaint to the district court; the table of contents from MESS's motions for partial summary judgment before the district court; MESS's opening brief to the Ninth Circuit; MESS's response and reply brief to the Ninth Circuit; EPA Headquarters Field Components; Stipulation dated September 25, 1987 regarding dismissal of MESS's imminent and substantial endangerment claim; Letter from Rep. Dingell; National Governors' Association Report, dated January, 1990.

Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675); and the CWA, 33 U.S.C. §§ 1251-1387, a brief overview of each is helpful to place into context the arguments advanced by the parties.

Congress enacted RCRA in 1976 "to assist the cities, counties and states in the solution of the discarded materials problem and to provide nationwide protection against the dangers of improper waste disposal." H.R.Rep. No. 1491, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249. RCRA requires the EPA to establish performance standards, applicable to owners and operators of hazardous waste treatment, storage and disposal facilities "as may be necessary to protect human health and the environment." 42 U.S.C. § 6924(a). The EPA enforces RCRA by requiring owners and operators of such facilities to obtain permits and by issuing administrative compliance orders and seeking civil and criminal penalties for violations. 42 U.S.C. §§ 6925, 6928. RCRA provides "a prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society." H.R.Rep. No. 1016(I), 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

Because RCRA applied only prospectively, it was "[c]learly inadequate" to address "the inactive hazardous waste site problem." H.R.Rep. No. 1016(I), at 17-18, *reprinted in* 1980 U.S.C.C.A.N. at 6120. Consequently, in 1980, Congress enacted CERCLA, "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." *Id.* at 22, 1980 U.S.C.C.A.N. at 6125. CERCLA was "designed to bring order to the array of partly redundant,

partly inadequate federal hazardous substances clean-up and compensation laws." *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985). CERCLA required the President to revise the "national contingency plan for the removal of . . . hazardous substances" which would "establish procedures and standards for responding to releases of hazardous substances. . . . " 42 U.S.C. § 9605(a). CERCLA finances these government response actions through the Hazardous Substance Superfund, § 9611(a)(1), 26 U.S.C. § 9507, and permits the government to seek reimbursement from responsible parties by holding them strictly liable. § 9607(a). CERCLA also requires the President to develop a national priority list ("NPL"), as part of the national contingency plan, which identifies "priorities among releases or threatened releases throughout the United States" for government response actions. § 9605(a)(8). The listing of a site on the NPL is a prerequisite to a Superfund-financed remedial action at the site. 40 C.F.R. § 300.425(b)(1).

Although Superfund monies cannot be used for remedial actions at federal facilities, 42 U.S.C. § 9611(e)(3), CERCLA otherwise applies to the federal government "to the same extent, both procedurally and substantively, as to any nongovernmental entity." § 9620(a)(1).

The CWA established a comprehensive program to restore and to maintain the chemical, physical and biological integrity of the waters of the United States. 33 U.S.C. §§ 1251-1387. In order to achieve water quality that provides for the "protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water," *id.* at § 1251(a)(2), Congress regulates all

discharges of pollutants into "navigable waters." Such discharge is forbidden unless authorized by a permit issued pursuant to § 402 of the Act. 33 U.S.C. § 1342. Any citizen may sue to enforce certain provisions of the Act. Section 1365(a)(1) permits any citizen to commence a civil action against any person allegedly in violation of an effluent standard or limitation or an order issued by the EPA regarding such a standard or limitation. 33 U.S.C. § 1365(a)(1).

III. FINDINGS RE: PROGRESS AND SCOPE OF CLEANUP

The court finds that MAFB began the investigation and cleanup process in 1979 by initiating a program of groundwater monitoring. Ierardi Decl., ¶ 15. Contamination was detected and several wells on and off based were closed. *Id.* The Installation Restoration Program ("IRP"), an Air Force program carried out pursuant to and under the authority of CERCLA and Executive Order 12580, was instituted to identify and evaluate contamination problems. *Id.;* IAG, Attachment C. Originally the cleanup adhered to the pre-SARA IRP process; it continued, after 1986, in accord with SARA and the IAG process. *Id.*

On July 21, 1989, the Air Force, EPA, and California entered into the McClellan Air Force Base Interagency Agreement ("IAG"), which became effective on May 2, 1990.[3] Exh. A to Ierardi Decl. The IAG is based upon the

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[3] The IAG was originally dated July 21, 1989, but delays caused by the San Francisco earthquake prevented earlier final review and approval by EPA Region IX. Ierardi Decl., ¶ 3.

placement of MAFB on the National Priorities List by EPA on July 22, 1987. IAG, § 5.1; Ierardi Decl., ¶ 5; 52 Fed. Reg. 27620 at 27641. The entire 2,949 acre area of MAFB is an NPL site. Second Ierardi Decl., ¶ 15. "The IAG is designed to accomplish unified and complete cleanup of MAFB pursuant to CERCLA."[4] Ierardi Decl., ¶ 16.

The Air Force and EPA entered those portions of the IAG relating to the remedial investigation ("RI") and feasibility study ("FS") pursuant to § 120 of CERCLA; RCRA §§ 6001, 3008(h), 3004(v) and (v), 42 U.S.C. §§ 6961, 6928(h), 6924(u) and (v); and Executive Order 12580. Ierardi Decl., ¶ 6. The Air Force also entered into these provisions of the IAG pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321, and the Defense Environmental Restoration program, 10 U.S.C.

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[4] The specific purposes of the IAG are described within the document as follows: (a) identify operable units prior to implementation of final remedial actions for the site; (b) establish requirements for the performance of a remedial investigation ("RI") and a feasibility study ("FS") for the site; (c) identify nature, objective, and schedule of response actions to be taken at the site, attaining that degree of cleanup mandated by CERCLA and by applicable state law; (d) implement selected remedial action(s) in accordance with CERCLA and applicable state law and meet requirements of CERCLA § 120(e)(2) pertaining to interagency agreements; (e) assure compliance with RCRA and other federal and state hazardous waste laws; (f) coordinate response actions at the site with the mission and support activities at MAFB; (g) expedite cleanup process; (h) provide for state involvement in the initiation, development, selection and enforcement of remedial actions to be undertaken at MAFB; (i) provide for operation and maintenance of any remedial action selected and implemented pursuant to this Agreement.

§ 2701 *et seq.* The Air Force and EPA entered into those portions of the IAG that relate to operable units and final remedial actions pursuant to CERCLA § 120(e)(2), 42 U.S.C. § 9620(e)(2), RCRA sections 6001, 3008(h) and 3004(u) and (v), 42 U.S.C. §§ 6961, 6928(h), 6924(u) and (v), and Executive Order 12580. The Air Force also entered these provisions of the IAG pursuant to the DERP. California entered into the IAG pursuant to CERCLA §§ 120(f) and 121, 42 U.S.C. §§ 9620(f) and 9621, and California Health and Safety Code §§ 102 and 25355.5(a)(1)(C). Ierardi Decl., ¶ 8; IAG, § 3.

The Air Force has agreed and is obligated under the IAG § 6.2 to undertake, seek adequate funding for, fully implement and report on the following tasks: (a) the remedial investigation for the site; (b) the feasibility studies for the site; (c) all response actions, including Operable Units for the site; (d) operation and maintenance of response actions at the site. Ierardi Decl., ¶ 11.

The Air Force is primarily responsible for accomplishing the cleanup of MAFB; EPA and California have also have roles in the process. Pursuant to § 7 of the IAG, entitled "Consultation," the Air Force must provide copies of all important documents relating to the cleanup to EPA and California for review and comment. The IAG distinguishes between "Primary" and "Secondary" documents; while both are submitted for review and comment, only Primary documents may serve as a basis for dispute resolution pursuant to § 12 of the IAG. Any dispute between the parties that cannot be resolved at a lower level will ultimately be decided by the EPA Administrator. Ierardi Decl., ¶ 13. If the parties are ultimately unable to agree on the selection of a remedial action, the EPA

Administrator will make that decision pursuant to § 12 of the IAG and CERCLA § 120(e)(4)(A). *Id.*

Under the cleanup plan, MAFB is divided into 11 Operable Units ("OUs"). Ierardi Decl., ¶ 16. There are approximately 254 sites of actual, suspected or potential contamination resulting from 57 years of industrial operations. *Id.*, ¶ 16. Cleanup addresses contaminants in the soil and soil gas and in the groundwater underlying the base. *Id.* The groundwater contamination is complex because MAFB is situated in an alluvial valley with a deposits of gravel, silt, sand, clay and other materials irregularly arranged in layers and because local hydrology is complex. *Id.*

Current remedial actions at MAFB are conducted entirely on-site. Ierardi Decl., ¶ 19. Waste from the cleanup process is either treated on site (by means of such technologies as the Groundwater treatment Plan, the soil vapor extraction process or McClellan's existing waste treatment plant) or it is retained in drums on site pending a final decision on how to clean up the area from which it was removed. *Id.*

Cleanup has already started in several OUs. Ierardi Decl., ¶ 22. Extraction and treatment of groundwater is underway in OU D and C. *Id.* The final cleanup of OUs will take place at the end of the RI/FS phase for the entire base. *Id.* Each OU will go through its own preliminary assessment/summary report (except E,F,G, and H, which will be investigated together), its own RI/FS and ROD. *Id.* Final cleanup actions will begin once the investigation in each OU is complete. *Id.* Division into OUs is intended

to establish priorities for cleaning up the areas posing the greatest threat to human health. *Id.*

OU B is progressing the most quickly through the CERCLA phases. The Air Force submitted a draft ROD for OU B1 on May 7, 1993. Ierardi Decl., ¶ 23. On July 6, 1993, EPA submitted its comment on the draft ROD. *Id.*

Section 17 of the IAG, entitled "Statutory Compliance/RCRA-CERCLA Integration," integrates the Air Force's CERCLA response obligations and RCRA corrective action obligations. IAG, § 17.1. The parties intend that the activities covered by the IAG will satisfy CERCLA, RCRA and applicable State laws and regulations. RCRA is considered an applicable or relevant and appropriate requirement ("ARAR") pursuant to CERCLA § 121. IAG, § 17.2. The IAG includes provisions for identifying and determining potential ARARs. IAG, §§ 7.6, 7,7. Both state regulators and EPA have the ability to nominate ARARs. Second Ierardi Decl., ¶ 15. Both state regulators and EPA have access to any data the Air Force has. IAG, § 22.

Both the IAG and MAFB's RCRA permit specifically require the remediation of disposal areas to be merged into the ongoing cleanup. Ierardi Decl., ¶ 18. The RCRA permit issued to MAFB by EPA Region IX states:

> Corrective action for releases from SWMUs [Solid Waste Management Units] at [MAFB] will be addressed by the McClellan AFB Interagency Agreement that was signed on July 21, 1989 by the EPA Region IX and McClellan AFB.

Exh. E to Ierardi Decl., § VI(A)(4).

Section 19 of the IAG expressly addresses the subject of permits, providing that:

> The Parties recognize that under section 121(d) and 121(e)(1) of CERCLA/SARA, 42 U.S.C. § 9621(d) and 9621(e)(1), and the NCP, *portions of the response actions called for by this Agreement and conducted entirely on-site are exempted from the procedural requirement to obtain a federal, State, or local permit* but must satisfy all the applicable or relevant and appropriate federal and State standards, requirements, criteria, or limitations which would have been included in any such permit.

IAG, § 19.1 (emphasis added).[5]

In July 1993, the McClellan Air Force Base Management Action Plan ("MAP") was completed. Exh. B to Ierardi Decl. Described as "the master planning and strategy document for our environmental restoration and compliance programs," the document "takes the place of our former Comprehensive CERCLA Workplan ("CCW"); however, it is not a primary document in accordance with our Interagency Agreement ("IAG")."[6] The MAP "is a

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[5] Under 42 U.S.C. § 9621(e)(1), "*No Federal, State, or local permit shall be required* for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section." (emphasis added).

[6] Because the MAP is not a primary document under the IAG, it is not enforceable by the EPA through the IAG's dispute resolution mechanism. However, the EPA agreed to update the CCW (a primary document) with the MAP and retains the power to withdraw approval of the preparation of the MAP instead of a CCW. Second Ierardi Decl., ¶ 14.

status summary of the [MAFB] environmental restoration and compliance programs" and "present a comprehensive strategy for implementing" the IAG. Second Ierardi Decl., ¶ 14. The MAP divides the site into operable units ("OUs"), ranks the OUs in order of cleanup priority, and sets milestones for accomplishing remedial investigations, feasibility studies and cleanup activities.

In light of the record established above, the court finds that underway at MAFB is a comprehensive CERCLA cleanup, as contemplated by CERCLA § 120, intending integration of and compliance with the requirements of RCRA, CERCLA, NCP, and all other applicable state laws.

The IAG does not control current operations at MAFB. Second Ierardi Decl., ¶ 6. These operations are subject to RCRA. *Id.*

IV. THE SCOPE OF CERCLA § 113(h)

Defendants contend that MESS' claims under the citizen enforcement suit provisions of RCRA and the CWA are barred by CERCLA § 113(h), 42 U.S.C. § 9613(h). "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In determining whether a statute precludes judicial review, courts look not only to its language, but also to "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative

action involved." *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984); *see also United States v. Fausto*, 484 U.S. 439, 449 (1988).

Section 113 of CERCLA, entitled "Civil Proceedings," sets forth the basis and limits of federal court jurisdiction to adjudicate actions arising out of CERCLA. Its provisions are "overarching in that § 9613 is the sole section of the statute to address jurisdiction." *Fairchild Semiconductor Corp. v. U.S. E.P.A.*, 984 F.2d 283, 286 (9th Cir. 1993). Subsection (h), captioned "Timing of review," was enacted as part of the 1986 Superfund Amendments. Section 113(h) retracts a large part of § 9613's broad jurisdictional grant, codifying pre-SARA court interpretations that CERCLA precludes preenforcement review of EPA remedial actions. *Id.* The Ninth Circuit has described the purpose behind § 9613(h)'s limitation on judicial review as ensuring that EPA can respond promptly to environmental hazards. *Id.* at 287.

Section 113(h) provides as follows:

> *No Federal Court shall have jurisdiction under Federal law* other than under section 1332 of Title 28 (relating to diversity of citizen jurisdiction) *or under State law* which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) *to review any challenges to removal or remedial action selected under section 9604 of this title*, or to review any order issued under 9606(a) of this title, *in any action except* one of the following:
>
> (1) An action under section 9607 of this title to recover response costs or damages or for contribution.

> (2) An action to enforce an order issued under section 9609(a) of this title or to recover a penalty for violation of such order.
>
> (3) An action for reimbursement under section 9609(b)(2) of this title.
>
> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
>
> (5) An action under section 9609 of this title in which the United States has moved to compel a remedial action.

42 U.S.C. § 9613(h) (emphasis added). It is undisputed that none of the five exceptions applies in the present case.

1. The Relevant Legislative History

Statements by members of both the House and Senate conference committees that drafted SARA, which added § 113(h), reflect the intent that § 113(h) apply broadly. Senator Thurmond, Chairman of the Senate Judiciary Committee, commented on the scope of § 113(h) as follows:

> The *timing of review* section is intended to be comprehensive. It covers *all lawsuits, under any authority,* concerning the response actions that are performed by the EPA. . . . The section also

> covers *all issues that could be construed as a challenge to the response,* and limits those challenges to the opportunities specifically set forth in the section. . . . Citizens, including potentially responsible parties, cannot seek review of the response action or their potential liability for a response action – other than in a suit for contribution – unless the suit falls within one of the categories provided in this section.

132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986) (emphasis added).

Similar intent was expressed by the Senate Judiciary Committee:

> This amendment is to expressly recognize that *pre-enforcement review* would be a significant obstacle to the implementation of response actions and the use of administrative orders. Pre-enforcement review would lead to considerable *delay* in providing cleanups, would *increase response costs,* and would discourage settlements and voluntary cleanups.

S.Rep. No. 11, 99th Cong. 1st Sess. 58 (1985) (emphasis added) (quoted in *Reardon v. U.S.,* 731 F.Supp. 558, 563 (D. Mass. 1990)). The House Committee on Public Works and Transportation stated:

> The purpose of this provision is to ensure that *there will be no delays associated with a legal challenge* of the particular removal or remedial action selected under section 104 or secured through administrative order or judicial action under section 106.

H.R.Rep. No. 253(V), 99th Cong., 1st Sess. 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3148 (emphasis added).

V. DISCUSSION

Section 113(h), by its plain language, applies to: (1) "any challenges," (2) "to removal or remedial action selected," (3) "under section 9604." The latter two requirements are not at issue because MESS has retreated from its argument on appeal that there is no EPA-approved CERCLA plan in effect and that "any cleanup that has taken place at MAFB has not been pursuant to the requirements of the federal facilities section of CERCLA (§ 120), but rather has been pursuant to the Defense Department's own internal IRP [Installation Restoration Program]." Plaintiffs' Exh. F, MESS App. Reply Br. at 36-38. Unquestionably, an IAG, an EPA-approved plan for carrying out response actions under CERCLA, as required by § 120, is present and in effect in this case. *See* Malinowski Decl., ¶ 10. Second, courts have concluded that the authority for CERCLA cleanups of federal facilities comes from § 9604, although § 120 "provides the special procedures or roadmap applicable to federal facilities." *Heart of America Northwest v. Westinghouse Hanford Co.*, 820 F.Supp. 1265, 1279 (E.D. Wash. 1993) (citing *Werlein v. United States*, 746 F.Supp. 887, 892 (D. Minn. 1990), *vacated in part*, 793 F.Supp. 898 (D. Minn. 1992)). It is clear from the record that underway at MAFB pursuant to the IAG and the MAP is "removal or remedial action selected" under § 9604, action of enormous scope and complexity.

The real issue in this case is whether MESS's claims constitute a challenge to the comprehensive CERCLA cleanup. MESS argues that it is not challenging CERCLA remedial action, rather it is pursuing an enforcement action under RCRA and CWA, "seek[ing] only to compel MAFB to comply with the notification and permitting requirements of RCRA, CWA, and California hazardous waste and water quality laws." The government, on the other hand, maintains that the relief requested by MESS "goes to the heart of the comprehensive CERCLA cleanup of McClellan" and, as such, amount to a barred challenge to an ongoing response action.

Courts have broadly interpreted "challenge" to include suits which, if successful, would delay, interfere with, alter or impact a CERCLA cleanup. Thus, any claims which "challenge activities that are reasonably related" to the objectives of a comprehensive cleanup plan fall under § 113(h). *Heart of America Northwest*, 820 F.Supp. at 1283.

Construing MESS's claims as either constituting or not constituting a challenge to a CERCLA cleanup is a bit anomalous, as both the original and amended complaints predated the CERCLA cleanup. MESS's own characterization of the relief sought has been somewhat of a moving target. On appeal, MESS described its action as "seeking accelerated and proper clean-up at MAFB." MESS App. Reply Br. at 40. At oral argument on this matter, MESS clarified the relief it seeks. Disavowing the injunctive relief claims contained in the complaint, MESS states that by this action it presently seeks an order directing MAFB: (1) to submit complete permit application papers identifying all past, present and future treatment, storage, and

disposal areas to the RCRA branch of the EPA and of the state regulatory agency pursuant to 40 C.F.R. § 270.13; (2) to notify EPA and state regulatory agencies of the points at which MAFB is discharging to surface and ground waters of the United States pursuant to the CWA; and (3) to comply with the subsequent determinations of the EPA and state agencies.

Applying the test articulated by the court in *Heart of America Northwest*, 820 F.Supp. at 1284, and argued by both parties to the present action – namely, whether the relief requested "would arguably interfere in a pragmatic sense" with the cleanup plans underway – yields the conclusion that the relief MESS requests directed to notification and permitting for past disposal, storage, and treatment sites amounts to a challenge to the ongoing comprehensive CERCLA cleanup, as it would have the effect of delaying, altering, impacting, or interfering with cleanup activity.[7] Both the RCRA and the CWA claims are closely interconnected with the comprehensive CERCLA cleanup. For example, it is clear from all the papers before the court that MESS's CWA claim focuses on the leaching of contaminants into groundwater from waste pits that are the part of the ongoing CERCLA cleanup.

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[7] For instance, preparation of permit applications involves additional study, documentation and substantiation, all of which could delay the ongoing cleanup activities while resources were redirected toward the application effort. The notification requested by plaintiffs would arguably interfere in a pragmatic sense with the notification procedures already incorporated into the IAG. Similarly, a suit seeking "proper" cleanup at MAFB almost by definition seeks to alter or interfere with the existing cleanup.

The groundwater underlying MAFB is itself an OU with an investigation and cleanup program established by the MAP. *See* MAP, §§ 3.4.1, 3.4.2. Accordingly, a claim directed to the groundwater underlying the Base is directed to an integral part of the cleanup and, as such, may not be sustained until cleanup is completed. However, to the extent that MESS seeks compliance with RCRA permitting requirements for current and future operations at MAFB, as the IAG expressly states it does not purport to address current operations, it is clear that such claims do not constitute a challenge to the ongoing comprehensive CERCLA cleanup.[8]

The courts to have considered the issue have consistently held that all preenforcement review actions are

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[8] MESS urges the court to allow its civil penalty claim to go forward, even if claims for other relief are dismissed, relying on *Werlein*, 746 F.Supp. 887. Unlike the damage claims in *Werlein*, which were based on common law, in the present case, plaintiffs claim civil penalties under the pertinent environmental statutes. *See* Complaint, ¶ 27. Thus, the monetary component of the relief requested depends entirely upon a finding that MAFB, in implementing the IAG, has violated those statutes. As such, the monetary relief is not separable from the injunctive and declaratory relief requested, as it was in *Werlein*. More importantly, as MESS recognized in its reply brief to the Ninth Circuit, the Supreme Court recently held that the United States has not waived sovereign immunity for civil penalty claims under RCRA and the CWA and therefore "that federal facilities such as MAFB are not subject to civil penalties when they violate RCRA and the CWA." MESS App. Reply Br., at 1 (citing *U.S. Department of Energy v. Ohio*, 112 S.Ct. 1627 (1992)). MESS's claims for civil penalties under RCRA and the CWA were dismissed by Judge Ramirez on that ground. *McClellan Ecological Seepage Situation v. Weinberger*, 655 F.Supp. 601 (E.D. Cal. 1986).

barred by the plain meaning of the statute, bolstering that interpretation with support from the legislative history. The Seventh Circuit has described § 113(h) as a "blunt withdrawal of federal jurisdiction." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991). The First Circuit reads the provision as divesting federal courts of jurisdiction over "challenges to EPA's administration of the statute claims that EPA did not 'select' the proper 'removal or remedial action,' in light of the standards and constraints established by the CERCLA statute." *Reardon v. United States*, 947 F.2d 1509, 1514 (1st Cir. 1991) (en banc).

This court's survey of the case law indicates that exceptionally few claims, however characterized by the party seeking relief, survived the broad application of § 113(h). Challenges to the constitutionality of CERCLA itself and to actions occurring outside of, and separate from, the Superfund site have been allowed to proceed prior to completion of the cleanup. Thus, in *Reardon*, the First Circuit held that a due process claim was not barred by § 113(h), where challenge was to constitutionality of the statute itself rather than to the constitutionality of EPA's administration of the statute. In *Chemical Waste Management, Inc. v. EPA*, 673 F.Supp. 1043 (D. Kan. 1987), a company that received and handled wastes from Superfund sites challenged EPA's determination that the company was ineligible to receive such wastes. The court found § 113 did not apply because the suit did not seek to interfere with any specific ongoing cleanup efforts; furthermore, the court noted, a determination of eligibility could serve to speed up, rather than delay or alter, the ongoing cleanup.

An exception to the string of cases deeming all claims amounting to preenforcement review barred by § 113(h) is *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), on which MESS relies heavily. At issue in that case was:

> whether a state which has been authorized by the EPA to "carry out" the state's hazardous waste program "in lieu of" RCRA, is precluded from doing so at a . . . facility owned and operated by the federal government which the EPA has placed on the national priority list, and where a CERCLA response is underway.

Id. at 1568-69.[9] Some of the Tenth Circuit's analysis is arguably applicable here: the court noted that RCRA itself expressly prohibits imminent hazard suits by citizens where the EPA is engaged in CERCLA removal actions, 42 U.S.C. § 6972(b)(2)(B), while not expressly so prohibiting citizen enforcement suits, 42 U.S.C. § 6972(b)(1)(B). *Id.* at 1578. The court, however, expressed no opinion about whether a RCRA citizen enforcement suit would be barred by § 113(h) because Colorado sought relief under its own statutes. *Id.* Accordingly, the above reasoning is dicta; the court's holding, relying on the CERCLA provision expressly preserving a role for states[10], did not purport to address whether other citizen

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[9] RCRA permits the EPA to authorize states to "carry out" their own hazardous waste programs "in lieu of" RCRA. 42 U.S.C. § 6926(b).

[10] CERCLA provides that "[n]othing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a).

suits survive § 113(h). Thus, *U.S. v. Colorado* is distinguishable from the present action. Plaintiffs here are not acting as a State enforcing delegated RCRA authority. Furthermore, unlike the situation in *U.S. v. Colorado*, the State of California is a full party to the IAG and is satisfied that the IAG is the appropriate mechanism to accomplish the environmental cleanup at MAFB. *See* Malinowski Decl., ¶¶ 8-12.

This court's reading of *U.S. v. Colorado* is in accord with that of the two courts to have addressed the issue after *U.S. v. Colorado*. The Eight Circuit, in *Arkansas Peace Center v. Arkansas Dept. of Pollution Control and Ecology*, 999 F.2d 1212 (8th Cir. 1993), held that it lacked jurisdiction over a citizen suit while a CERCLA removal action was underway. Plaintiffs sought to enjoin incineration, alleging that a contractor failed to demonstrate destruction and removal efficiency of 99.9999% as required under 40 C.F.R. § 264.343(a)(2). The court concluded that *U.S. v. Colorado* "limited its holding to an action brought by a state." *Id.* at 1218. Thus, *U.S. v. Colorado* did not operate to defeat the plain language of § 113(h) and enable the citizen action at issue in *Arkansas Peace Center*.

The court in *Heart of America Northwest v. Westinghouse Hanford Co.*, 820 F.Supp. 1265 (E.D. Wash. 1993) considered claims virtually identical to those in the present case. Plaintiffs in that case brought a citizen suit under the CWA and RCRA alleging unpermitted discharges and unreported releases of hazardous substances. The court found that the discharges which plaintiffs claimed required CWA permits were governed by a CERCLA cleanup undertaken pursuant to a three-party agreement and that the notice requested by plaintiffs

would interfere with information dissemination procedures established under the FFA. Holding that it lacked jurisdiction, the court reasoned that *U.S. v. Colorado* was distinguishable: "In that case, the challenge was by a state to enforce its laws that had been approved by the EPA. The challenge was not brought under citizen suit provisions." *Id.* at 1282. In *Heart of America*, as here, the State was a party to a comprehensive CERCLA cleanup agreement pursuant to CERCLA § 120.

Other district courts have also directly considered, and rejected, MESS's contention that suits seeking enforcement of statutes other than CERCLA are not challenges but are instead collateral or supplemental to the CERCLA response action. *See, e.g., North Shore Gas Co.*, 930 F.2d at 1244 (barring claim under RCRA and NEPA); *Broderick v. United States EPA*, Civ. No. 92-3350 (HLS) (D.N.J. 1993) (§ 113(h) barred a citizen suit under the CWA). In *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990), the court held that § 113(h) barred citizens from bringing suit challenging a consent decree between EPA and a potentially responsible party ("PRP") for failing to prepare an environmental impact statement in violation of the National Environmental Policy Act. The Seventh Circuit rejected plaintiffs' argument that they were not challenging the remedial action itself, but rather sought to ensure that procedural requirements were complied with, concluding that "challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute." *Schalk*, 900 F.2d at 1095. In *Reynolds v. Lujan*, 785 F.Supp. 152 (D.N.M. 1992), neighbors of a landfill

brought a RCRA citizen action alleging that their property was contaminated by solid and hazardous wastes from the landfill. The court reasoned that the language of § 113(h) was "broad," precluding "any challenges," *id.* at 153, and concluded that the suit was barred as challenging CERCLA activities underway at the landfill because "if the court granted plaintiffs' request, it would have to alter the ongoing response activities." *Reynolds*, 785 F.Supp. at 154.

Similarly, the Third Circuit has concluded that "Congress could hardly have chosen clearer language to express its intent generally to deprive the district courts of jurisdiction over claims based on other statutes." *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1020 (3d Cir. 1991). Thus, an enforcement suit challenging EPA's failure to comply with the National Historic Preservation Act and its implementing regulations in conjunction with pre-cleanup activities, would could "delay or interfere" with pre-cleanup activities, was barred. *Id.* at 1023. Despite its recognition that delayed review under the circumstances might amount to no review at all, because the EPA's cleanup might destroy the site's historical value, the court stated: "Boarhead's remedy lies with Congress, not the district court." *Id.*

Although it may make sense from a policy standpoint, MESS's contention that § 113(h) intended to preclude only PRPs from delaying cleanup by filing dilatory suits contesting liability, such a distinction between suits by PRPs and citizen groups is unsupported by the plain language of the statute. Section 113(h) clearly refers to "any" challenge, making no exception for suits undertaken by citizen groups. A number of courts, as noted

above, have held that § 113(h) barred a citizen group's challenge to an ongoing CERCLA cleanup. *See Arkansas Peace Center*, 999 F.2d at 1217; *In Re Hanford Nuclear Reservation Litigation*, 780 F.Supp. 1551, 1559 (E.D. Wash. 1991); *Werlein*, 746 F.Supp. 887; *Reynolds*, 785 F.Supp. 152; *Redland Soccer Club, Inc. v. Department of the Army*, 801 F.Supp. 1432, 1435-36 (M.D. Pa. 1992) (CERCLA and state law citizen suit barred under § 113(h)); *Broderick*, Civ. No. 923350 (HLS) (D.N.J. 1993).

MESS maintains that the elimination of its request for injunctive relief distinguishes this case from others where the asserted claims confronted § 113(h)'s bar. That contention overlooks the fact that the practical consequences of entering the order suggested by MESS would be tantamount to an injunction. The element of compulsion in the relief sought is readily apparent in MESS's third claim, which would order compliance with any determinations by federal and state regulatory bodies. The effect of mandating such compliance would be to alter or impact activities reasonably related to the comprehensive cleanup.

However, one aspect on MESS's claims clearly do not amount to a challenge to the ongoing CERCLA cleanup. Although the parties dispute whether the three currently active sites which MAFB admits are not covered by the IAG have obtained RCRA permits, that issue is irrelevant for jurisdictional purposes. At issue on remand is whether MESS's claims that current operations are not properly in compliance with RCRA permitting requirements can go forward prior to completion of the cleanup. As the controlling cleanup document itself excludes such operations from its scope, Second Ierardi Decl., ¶ 6, those claims do not represent a challenge to the comprehensive

cleanup effort. Accordingly, MESS can maintain this claim.

VI. CONCLUSION

Courts and commentators have noted that there is an uneasy fit, indeed, a tension, between § 113 and other bodies of federal environmental law. *See North Shore Gas Co.*, 930 F.2d at 1245 ("the breadth of section 113(h) is troublesome."); *Werlein*, 746 F.Supp. at 894 (acknowledging that by "[b]y applying section 9613(h) to RCRA, CWA, and [state law claims] the court is frustrating, to a certain extent, the purposes underlying those statutes. This is troubling, and clearly due to the fact that Congress chose to legislate in a piecemeal fashion in the environmental area."). *See also* Michael P. Healy, *Judicial Review and CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning*, 17 Harv. Envtl. L. Rev. 1 (1993); James A. Rogers, *Truth, Justice . . . And Superfund*, C795 ALI-ABA 1 (1993). Congress, however, has not seen fit to narrow the broad scope of the provision or to except provisions of other statutes.

In accord with the plain language of section 113(h), and in light of the Congressional intent, based upon the court's finding that a comprehensive CERCLA cleanup is presently underway at MAFB, this court determines plaintiffs' claims for relief under RCRA and the CWA with respect to contamination sites now undergoing cleanup represent challenges to such removal and remedial cleanup activities, and that the court accordingly lacks jurisdiction over such claims. However, plaintiffs'

claims directed to RCRA compliance with respect to current and future operations are not so barred.

The Clerk of the Court is hereby ORDERED to transmit the foregoing findings and determination to the Ninth Circuit Court of Appeals.

DATED: October 28, 1993

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

(LOGO)

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

APR 10 1992

FROM: Lisa K. Friedman
Associate General Counsel
Solid Waste and Emergency Response Division
(LE-132S)

TO: Don R. Clay
Assistant Administrator
Solid Waste and Emergency Response (OS-100)

As you requested, this memorandum will respond to the legal issues raised by Region IV in their January 24, 1992 memorandum to you. The Region's questions concern the applicability of RCRA post-closure permit requirements at CERCLA sites, in light of the permit waiver in CERCLA section 121(e)(1).

BACKGROUND

The Department of Energy (DOE) has a number of RCRA "regulated units" at its Oak Ridge facility in Tennessee, including hazardous waste surface impoundments, land treatment units, and landfills that received hazardous waste after July 26, 1982 and certified closure after January 26, 1983. (None of these regulated units were created as part of a CERCLA removal or remedial action.) As required in the RCRA regulations at 40 CFR 270.1(c), DOE filed applications for post-closure permits

for some of the units, although it has now ceased that effort in light of CERCLA activities at the site, discussed below.

Pursuant to CERCLA section 120, EPA and DOE entered into a Federal Facility Agreement (FFA) for the Oak Ridge site on November 13, 1991, under which the site (which is included on the National Priorities List) would be cleaned up under CERCLA; as part of the CERCLA action, the FFA specifically requires the attainment of RCRA requirements that are found to be applicable or relevant and appropriate requirements (ARARs).

DOE has taken the position, based on CERCLA section 121(e)(1), that RCRA permits are not necessary or required at NPL sites and that instead, RCRA requirements for groundwater protection and post-closure care need to be met only to the extent they constitute ARARs for the CERCLA response action at the facility; DOE further argues, based on the decision in *United States v. Colorado* (D.Colo. Aug. 14, 1991) that the State has no authority to enforce RCRA permit requirements at an NPL site. Region IV takes a contrary position, arguing that DOE has an obligation to apply for and obtain post-closure permits for non-CERCLA, RCRA-regulated units at Oak Ridge. The Region notes that RCRA permitting requirements were triggered by DOE's decision to operate and close these specific types of hazardous waste management units beyond key dates established in RCRA regulations.

In addition to the legal issue, DOE expressed the practical concern that a requirement to study and respond to groundwater contamination at individual

RCRA units as part of separate post-closure permits, rather than addressing the site groundwater in its entirety under CERCLA, would not be efficient or cost-effective.

Region IV has raised three specific questions for Headquarters' review.

DISCUSSION

> *Question 1:* Does CERCLA section 121(e)(1) relieve DOE from the requirement to apply for post-closure permits at NPL sites and instead require RCRA 40 CFR 264 standards for post-closure care and groundwater protection be considered as ARARs in a ROD?

No; CERCLA does not relieve DOE from the requirement to obtain post-closure permits for pre-existing, RCRA-regulated units at NPL sites. CERCLA section 121(e)(1) provides that:

> No Federal, State, or local permit shall be required *for the portion of any removal of remedial action* conducted entirely onsite, where *such remedial action is selected and carried out in compliance with this section.*

Thus, no permits need to be obtained in order to conduct a remedial action "selected and carried out in compliance with" CERCLA section 121, even if that action will involve the treatment, storage or disposal of hazardous waste. However, this does not eliminate the need to secure a permit where the facility is required to obtain a

permit due to the presence of a RCRA Subtitle C treatment, storage or disposal unit that was *not* created by the CERCLA action.

Of course, any remedial action selected for the site under CERCLA section 121 would have to attain (or waive) the substantive standards set out in RCRA 40 CFR 264, to the extent they are determined to be ARARs.

The decision in *United States v. Colorado* (D.Colo. Aug. 14, 1991) does not change this analysis. In that case, Colorado was attempting to enforce a closure plan under RCRA that was in conflict with a cleanup plan under CERCLA; the district court found, in effect, that in order to evaluate whether or not to enforce Colorado's claim, he would have been required to review EPA's remedial action decision under CERCLA – such review is barred by CERCLA section 113(h). The *Colorado* decision does not limit the ability of a state to issue, and seek to enforce, RCRA orders or permits that do not conflict with the CERCLA-selected remedy.

This analysis is further supported by the fact that RCRA "facilities" and CERCLA "sites" are not necessarily coterminous. In cases where the CERCLA site is only a portion of the RCRA facility (e.g., consisting of several of the larger solid waste management units), the corrective action portion of the RCRA permit must be available to address the contamination that is subject to RCRA only. However, if in that example the permitted unit were on the CERCLA site, and if RCRA requirements could not be enforced at RCRA-regulated units on a CERCLA site (as DOE argues), then the RCRA permit's ability to address releases at solid waste management units of the RCRA

facility would be improperly prevented; this cannot be correct.

EPA has recognized that where there are corrective action requirements in a RCRA post-closure permit and remedial action requirements a CERCLA decision document, there is the potential for conflict or overlap between the two authorities in addressing contamination problems (*see* NPL Listing Policy for Federal Facilities, 53 Fed. Reg. 10520, 10522-23 (March 13, 1989) (attached)). As the Agency noted in the preamble to the 1990 revisions to the NCP,

> EPA . . . has the discretion to use its authorities under CERCLA, RCRA, or both to accomplish appropriate cleanup action at a site, even where the site is listed on the NPL. (See 54 FR at 41009 (Oct. 4, 1989). . . . In the context of federal facility cleanups, this decision, and the cleanup plan in general, would be discussed in the Interagency Agreement (IAG) for the facility.

55 Fed. Reg. 8666, 8698 (March 8, 1990). The Agency has a number of options for harmonizing operation of the two authorities and avoiding duplicative orders and overlaps.

First, any conflict or overlap could be avoided by establishing a timing sequence for evaluation of site problems under RCRA and CERCLA. For instance, the RCRA post-closure permit could establish a schedule of compliance (as allowed under RCRA section 3004(u)), according to which the appropriate corrective action would be determined *after* completion of the CERCLA action; if a thorough CERCLA response is carried out, there will be no need for further action when the site is reviewed

under RCRA. Such a provision in a RCRA permit might read as follows:

> In light of the requirement in the FFA to achieve a cleanup under CERCLA that is protective of human health and the environment, corrective action under this permit shall be determined according to the following schedule: after the work called for in the FFA has been completed, the need for any further corrective action, under this permit, shall be evaluated. Such further corrective action shall be limited to action required based on new information or conditions, not available at the time of the remedy selection under the FFA, that render the FFA remedy no longer protective of human health or the environment.

Similarly, the CERCLA decision document could delay its review of certain units (or "carve out" those units) while action proceeds under RCRA; such areas would then be revisited under CERCLA after the RCRA action has been completed, as part of the review of the site for possible deletion from the NPL. As EPA explained in the NPL Listing Policy for Federal Facilities,

> In some circumstances, it may be appropriate under an [Interagency Agreement] to divide responsibilities, focusing CERCLA activity only on certain prescribed units, leaving the cleanup of other units under the direct control of RCRA authorities, such as where the RCRA-regulated hazardous waste management unit is physically distinct from the CERCLA contamination and its cleanup would not disrupt CERCLA activities.

53 Fed. Reg. at 10523. It is generally expected that sites cleaned up under RCRA would qualify for "no action"

under CERCLA. (This approach is discussed in your memorandum, "Requirements for Cleanup of Final NPL Sites Under RCRA" (Don R. Clay, July 11, 1990) (attached).)

Alternatively, a potential overlap could be resolved by drafting a RCRA permit that references the CERCLA cleanup actions. For instance, the corrective action condition of the RCRA permit could be written to say:

> In light of the requirement in the FFA to achieve a cleanup under CERCLA that is protective of human health and the environment, corrective action under the permit is unnecessary, as long as the permittee complies with the conditions in the FFA, including modifications thereto.

In situations like Oak Ridge, where there are interconnected groundwater plumes rather than distinct source units, EPA has stated that it is generally most appropriate to address the contamination comprehensively under an enforceable agreement under CERCLA (e.g., an FFA), *see* 53 Fed. Reg. at 10523, and to use mechanisms like those discussed above to have the RCRA permit take into account the CERCLA action.

Finally, the Agency recognizes that there may be cases where a RCRA-authorized State declines to coordinate RCRA cleanup actions with an on-going CERCLA action, and a conflict may occur that cannot be resolved through discussions. In that case, EPA may resolve the conflict using CERCLA section 122(e)(6), which prohibits

a PRP from taking remedial action at a CERCLA site without EPA's authorization[1]:

> Inconsistent Response Action – When [an RI/FS has been initiated] for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

EPA has interpreted this authorization requirement to extend to PRP remedial actions *ordered by a State. See* discussion at 53 Fed. Reg. 10523. Thus, once an RI/FS has been initiated, EPA can deny a PRP authorization to comply with a state order or permit calling for remedial action at the CERCLA site.

Of course, EPA also has the discretion under section 122(e)(6) to allow the PRP to implement the State-ordered remedy; this might be appropriate where, for example, the State-ordered cleanup activities would be consistent with, or distinct from, the CERCLA action. To our knowledge, the Region has not yet made any decisions under the CERCLA section 122(e)(6) authorities.

> Question 2: Does the Tennessee Department of Environment and Conservation (TDEC) reserve its rights to require DOE to apply for post-closure permits if DOE fails to fulfill its obligation to conduct timely remedial investigations and remedial actions (schedules to be negotiated

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[1] In the Superfund Executive Order, No. 12580, the President's authority under CERCLA section 122(e)(6) for NPL sites has been delegated to EPA. *See* E.O., Section 4(d)(1). *See also* discussion at 54 FR at 10523, n. 10.

> pursuant to the FFA) for certain RCRA regulated units at Oak Ridge Reservation (ORR)?

The answer to the question of whether TDEC has "reserved" specific rights depends on the language agreed to by TDEC in the FFA as well as the language of the post-closure permit and applicable State regulations. (Clearly if TDEC incorporated a schedule of compliance into the permit, then it would have reserved its right to at least review the site after the CERCLA action has been completed to determine if any permits or other action are necessary under RCRA; similarly, if the permit included a permit condition stating that "corrective action under the permit is unnecessary *as long as* the permittee complies with the conditions in the FFA," the failure to comply with the FFA could trigger a review of RCRA responsibilities.) However, as explained above, it is clear that the simple issuance of an FFA for the Oak Ridge site does not, without more, act to preempt the effect of permits required under RCRA (including RCRA-authorized State law) for non-CERCLA activities.

The continued applicability of RCRA permitting requirements appears to have been contemplated by DOE and EPA in the FFA for Oak Ridge. Section IV, C. of the FFA provides that:

> ongoing hazardous waste management activities at ORR [Oak Ridge Reservation] may be subject to or require the issuance of additional permits under Federal or state laws. This agreement does not relieve the DOE of its obligations, if any, to obtain such permits. This Agreement does not supersede, modify, or otherwise change the requirements of the DOE's existing RCRA permits.

Question 3: Does EPA have discretionary authority to disallow entirely, or limit the CERCLA section 121(e)(1) permit waiver provision to ensure that NPL and non-NPL RCRA facilities are treated equitably?

CERCLA section 121(e)(1) provides that no federal, state, or local permit "shall be required" for CERCLA response actions, thereby effectively limiting EPA's ability under the statute to require a PRP to obtain a permit *for a CERCLA response action.*

However, this does not mean that a PRP may not have an obligation to comply with a permit issued with regard to matters other than the CERCLA response action. For example, where a facility has a pre-existing NPDES discharge permit related to ongoing activities distinct from the CERCLA actions, that permit remains in force even if the site is listed on the NPL and an RI/FS is initiated under CERCLA. In addition, if obligations under a preexisting permit would overlap with planned CERCLA activities, EPA could authorize a PRP, under CERCLA section 122(e)(6), to carry out remedial actions called for in an order or permit issued under another federal or State law.

If you have any questions concerning these responses, or would like to discuss the issues further, please contract me (260-7697) or Larry Starfield of my staff (260-1598).

Attachments

Supreme Court, U.S.
FILED
JUN 29 1995
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(2)

No. 94-1807

In the Supreme Court of the United States

OCTOBER TERM, 1994

MCCLELLAN ECOLOGICAL SEEPAGE SITUATION, MARY FISHER, AND CHARLES YARBROUGH, PETITIONERS

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9613(h), deprives federal courts of jurisdiction over an environmental citizen suit that challenges ongoing government cleanup activities at a CERCLA site.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Alabama v. *EPA*, 871 F.2d 1548 (11th Cir.), cert. denied, 493 U.S. 991 (1989)	9
Arkansas Peace Center v. *Arkansas Dep't of Pollution Control & Ecology*, 999 F.2d 1212 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994)	7, 12, 13
Boarhead Corp. v. *Erickson*, 923 F.2d 1011 (3d Cir. 1991)	8, 13
Chateaugay Corp., In re, 944 F.2d 997 (2d Cir. 1991)	12, 13
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987)	14
Metropolitan Stevedore Co. v. *Rambo*, No. 94-820 (June 12, 1995)	12
North Shore Gas Co. v. *EPA*, 930 F.2d 1239 (7th Cir. 1991)	7-8, 13
Reardon v. *United States*, 947 F.2d 1509 (1st Cir. 1991)	12
Schalk v. *Reilly*, 900 F.2d 1091 (7th Cir.), cert. denied, *sub nom. Frey* v. *Reilly*, 498 U.S. 981 (1990)	8, 9, 13
United States v. *Akzo Coatings of America, Inc.*, 949 F.2d 1409 (6th Cir. 1991)	10
United States v. *Colorado*, 990 F.2d 1565 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994)	10, 11-12

Statutes and regulations:

Clean Water Act, 33 U.S.C. 1251 *et seq.*	2

Statutes and regulations—Continued: Page

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.* 2
§ 104, 42 U.S.C. 9604 (Supp. V 1993) 2-3
§ 105, 42 U.S.C. 9605 (Supp. V 1993) 3
§ 113(h), 42 U.S.C. 9613(h) ..... *Passim*
§ 113(h)(4), 42 U.S.C. 9613(h)(4) 7
§ 115, 42 U.S.C. 9615 (Supp. V 1993) 3
§ 120, 42 U.S.C. 9620 (Supp. V 1993) 3, 5, 7
§§ 120-121, 42 U.S.C. 9620-9621 8
§ 120(e)(2), 42 U.S.C. 9620(e)(2) 3
§ 121(d), 42 U.S.C. 9621(d) (1988 & Supp. V 1993)... 11
§ 121(d)-(f), 42 U.S.C. 9621(d)-(f) (1988 & Supp. V 1993) 11
§ 121(e), 42 U.S.C. 9621(e) 11
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.* 2
Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 3
Exec. Order No. 12,316, 3 C.F.R. 170 (1981 Comp.) 3
Exec. Order No. 12,580, 3 C.F.R. 195 (1987 Comp.) 3
40 C.F.R. (1994):
Pt. 300, App. B 3
Section 300.415(i) 11

Miscellaneous:

132 Cong. Rec. (1986):
pp. 28,410-28,411 9
p. 29,735 9
pp. 29,735-29,736 9
52 Fed. Reg. (1987):
p. 27,620 3
p. 27,641 3
55 Fed. Reg. 8698 (1990) 9

In the Supreme Court of the United States

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v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 47 F.3d 325. The October 28, 1993, order of the district court (Pet. App. 169-196) is unreported. The district court has resolved other matters in this case through opinions reported at 655 F. Supp. 601 (Pet. App. 20-28), 707 F. Supp. 1182 (Pet. App. 29-82), and 763 F. Supp. 431 (Pet. App. 83-118), and through two unreported opinions (Pet. App. 119-155, 156-165).

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1995. The petition for a writ of certiorari

was filed on May 1, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a decision dismissing their claims that the Department of Defense has violated the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, in responding to hazards at inactive waste sites at the McClellan Air Force Base in Sacramento, California. The government is currently conducting a cleanup of those waste sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.* The court of appeals ruled that Section 113(h) of CERCLA, 42 U.S.C. 9613(h), deprived the district court of jurisdiction to entertain petitioners' claims challenging the ongoing CERCLA cleanup.

1. Since its establishment in 1936, McClellan Air Force Base (McClellan) has primarily served as an aircraft maintenance and repair depot. McClellan used toxic and hazardous materials in its operations and consequently generated toxic and hazardous waste. McClellan disposed of most of the waste through burial in earthen pits on the Base, but it phased out and ceased that practice by the late 1970s. In 1979, McClellan voluntarily initiated an investigation to study those past disposal practices and associated groundwater contamination. In 1980, McClellan began implementing a cleanup program under Section 104 of CERCLA, 42 U.S.C. 9604 (1988

& Supp. V 1993), and Executive Order No. 12,316, 3 C.F.R. 168 (1981 Comp.). See Pet. App. 7-8.[1]

Congress amended CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, which included detailed provisions respecting government cleanups at federal facilities. See CERCLA § 120, 42 U.S.C. 9620. The Environmental Protection Agency (EPA) listed McClellan on the National Priority List (NPL), which identifies the Nation's most serious hazardous waste sites. See CERCLA § 105, 42 U.S.C. 9605 (1988 & Supp. V 1993); 40 C.F.R. Pt. 300, App. B; 52 Fed. Reg. 27,620, 27,641 (1987). At the same time, the cleanup process at McClellan was reshaped to conform to the requirements of Section 120 of CERCLA. Pet. App. 8.[2]

EPA, the Air Force, and the State of California entered into an Interagency Agreement pursuant to Section 120(e)(2) of CERCLA to accomplish a unified and complete cleanup of contamination at McClellan. The parties signed the agreement on July 21, 1989,

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[1] Congress has empowered the President to administer CERCLA and to delegate his response authority to subordinate officials. See CERCLA § 115, 42 U.S.C. 9615 (1988 & Supp. V 1993). The President has authorized the Secretary of Defense to select removal or remedial actions at Department of Defense facilities. Exec. Order No. 12,316, § 2(c), 3 C.F.R. 170 (1981 Comp.). Until 1986, the Department of Defense satisfied its CERCLA duties and conducted its Section 104 remedial activities under a program known as the Installation Restoration Program.

[2] After Congress amended CERCLA in 1986, the President directed the Secretary of Defense to exercise response authority consistent with CERCLA's amended provisions. See Exec. Order No. 12,580, § 2(d), 3 C.F.R. 195 (1987 Comp.).

and it became effective on May 2, 1990. The Agreement establishes a process for investigation of site hazards, assessment of remedial alternatives, and remediation of contamination at the Base. The Agreement requires McClellan to incorporate all applicable legislative requirements into its cleanup through a Management Action Plan. Pet. App. 8.

The Plan divides the site into 11 operable units (OUs), ranks the OUs in order of cleanup priority, and sets milestones for accomplishing remedial investigations, feasibility studies, and cleanup activities. Groundwater remediation plays a central role in the response action. The groundwater beneath the Base is extracted and cleansed through a treatment plant that became operational in 1987. Numerous other response and remedial actions addressing soil contamination and other hazards have been implemented or are planned. See Pet. App. 8, 175-179.

The Interagency Agreement specifies that the activities covered by the Agreement will satisfy CERCLA, RCRA, CWA, and applicable state laws and regulations apart from the environmental permitting regimes that govern non-CERCLA activities. Section 17 of the Agreement, entitled "Statutory Compliance/RCRA-CERCLA Integration," integrates the Air Force's CERCLA response obligations and RCRA requirements. Section 19 of the Agreement additionally states:

> The Parties recognize that under section 121(d) and 121(e)(1) of CERCLA/SARA, 42 U.S.C. § 9621(d) and 9621(e)(1), and the [National Contingency Plan], portions of the response actions called for by this Agreement and conducted

> entirely on-site are exempted from the procedural requirement to obtain a federal, State, or local permit but must satisfy all the applicable or relevant and appropriate federal and State standards, requirements, criteria, or limitations which would have been included in any such permit.

The Agreement also specifies a dispute resolution mechanism to resolve disagreements among the signatories. Pet. App. 179-181.

2. In 1986, petitioners brought this action against the Secretary of Defense, alleging violations of the CWA, RCRA, and related state laws. In relevant part, petitioners sought to subject the inactive McClellan waste sites, which are currently being addressed through Section 120 of CERCLA and the Interagency Agreement, to RCRA's reporting and permitting requirements and to the CWA's permitting requirements. In a series of opinions, the district court ruled against petitioners on the merits of their claims. Pet. App. 20-28; *id.* at 29-82; *id.* at 83-118; *id.* at 119-155; *id.* at 156-165.

Petitioners appealed. After hearing oral argument, the court of appeals remanded the case to the district court to augment the record with respect to the progress and scope of the CERCLA cleanup at McClellan and to decide whether the district court's jurisdiction over petitioners' claims was barred by Section 113(h) of CERCLA. Pet. App. 166-168. Section 113(h) provides in pertinent part as follows:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) * * * to review any challenges to removal or remedial action selected under section 9604 of

> this title * * * in any action except [certain prescribed CERCLA proceedings].

42 U.S.C. 9613(h).

On remand, the district court concluded that petitioners' claims directed at sites undergoing cleanup activities constituted challenges to CERCLA remedial and removal actions and were therefore barred by Section 113(h). Pet. App. 169-196. The court specifically ruled that "a comprehensive CERCLA cleanup is presently underway at [McClellan]," that petitioners' "claims for relief under RCRA and the CWA with respect to contamination sites now undergoing cleanup represent challenges to such removal and remedial cleanup activities," and that "the court accordingly lacks jurisdiction over such claims." *Id.* at 195.

The court of appeals agreed with the district court's analysis. Pet. App. 1-20. The court rejected petitioners' contention that Section 113(h) of CERCLA is limited to claims alleging violation of CERCLA, ruling that Section 113(h) withholds federal jurisdiction to review any claims, including those under other statutes, that are found to constitute "challenges" to ongoing CERCLA cleanup actions. Pet. App. 10-11. The court of appeals concluded that all of petitioners' claims for relief connected with McClellan's inactive sites were challenges to the CERCLA cleanup because petitioners sought "to improve on the CERCLA cleanup as embodied in the Interagency Agreement" and because the injunctive and declaratory relief sought by petitioners would interfere with that cleanup. *Id.* at 14-15.

ARGUMENT

Section 113(h) of CERCLA, 42 U.S.C. 9613(h), imposes a jurisdictional limit on the manner and timing of federal district court challenges to CERCLA response actions. That Section provides that no federal court shall have jurisdiction to review "any challenges to removal or remedial action" selected under CERCLA except through five specific avenues, none of which is involved in this case. The court of appeals properly concluded that Section 113(h) bars petitioners' claims under the CWA and RCRA, because those claims pose "challenges to removal or remedial action" selected under CERCLA for the cleanup of inactive waste sites at McClellan. That ruling does not warrant further review.

1. CERCLA provides a specific framework for cleaning up hazardous wastes at federal facilities and for incorporating existing environmental standards in the remedy selection process. See CERCLA § 120, 42 U.S.C. 9620 (1988 & Supp. V 1993). It also limits judicial challenges to ongoing CERCLA cleanups that would interfere or overlap with the remedial activities. The CERCLA provision that accomplishes that result, Section 113(h), generally postpones judicial involvement until the cleanup has been completed. See CERCLA § 113(h)(4), 42 U.S.C. 9613(h)(4) (allowing a citizen suit once the response action has been "taken" or "secured"). It thereby ensures that an authorized cleanup can be completed without protracted litigation. See Pet. App. 10-11, 186-189; accord *Arkansas Peace Center* v. *Arkansas Dep't of Pollution Control & Ecology*, 999 F.2d 1212, 1218 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994); *North Shore Gas Co.* v. *EPA*, 930 F.2d 1239,

1244 (7th Cir. 1991); *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1018-1023 (3d Cir. 1991); *Schalk* v. *Reilly*, 900 F.2d 1091, 1095-1097 (7th Cir.), cert. denied *sub nom. Frey* v. *Reilly*, 498 U.S. 981 (1990).

Petitioners object to the court of appeals' interpretation of Section 113(h) as a "blunt withdrawal of federal jurisdiction." Pet. App. 10. They argue that the court's application of that provision would "preempt" or "repeal" other environmental laws. Pet. 16-17. Petitioners overlook that CERCLA incorporates existing federal and state environmental standards in cleanup plans. See, *e.g.*, CERCLA §§ 120-121, 42 U.S.C 9620-9621 (1988 & Supp. V 1993). As the court of appeals explained (Pet. App. 12), the Interagency Agreement in this case provides the CERCLA mechanism for enforcing substantive requirements under the CWA and RCRA. That Agreement requires McClellan to comply with the substantive standards and prescribes a process for the governing regulatory authorities—EPA and the State of California—to coordinate compliance. Hence, Section 113(h)'s limitation on judicial jurisdiction does not preempt or repeal the CWA or RCRA standards; it restricts only *judicial* involvement at CERCLA sites.

Petitioners argue (Pet. 19-20) that if Congress had intended to limit judicial challenges under the CWA and RCRA pending completion of CERCLA remedial action, Congress would have said so in the CWA or RCRA. But Congress intended to insulate ongoing CERCLA cleanups not only from CWA and RCRA suits, but from other legal challenges. It therefore expressed that intent in CERCLA itself. Petitioners also suggest (Pet. 21-24) that Section 113(h) should apply only to potentially responsible parties. But

Section 113(h) makes no distinction between responsible parties and citizen group plaintiffs. See 42 U.S.C. 9613(h). CERCLA's legislative history confirms that Section 113(h) applies to all persons and all challenges.[3]

Petitioners err in contending (Pet. 24-27) that the court of appeals' decision is contrary to EPA's understanding of CERCLA. The EPA sources that petitioners cite (Pet. 25-26) do not state that a citizen suit seeking RCRA compliance may proceed without regard to Section 113(h) at federal facility sites that are undergoing a CERCLA cleanup. Those sources indicate, instead, that potential overlap between RCRA and CERCLA at a federal facility should be resolved through the Interagency Agreement for the facility. See, *e.g.*, 55 Fed. Reg. 8698 (1990); Pet. App. 201-202. In this instance, the Interagency Agreement specifically addresses the integration of RCRA and CERCLA and dispenses with the need for RCRA permits at inactive CERCLA sites. See pp. 4-5, *supra*.[4]

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[3] See, *e.g.*, 132 Cong. Rec. 28,410-28,411 (1986) (Sen. Thurmond); *id.* at 29,735-29,736 (Rep. Glickman); *id.* at 29,735 (Rep. Lent); *Schalk*, 900 F.2d at 1096; *Alabama* v. *EPA*, 871 F.2d 1548, 1557 (11th Cir.), cert. denied, 493 U.S. 991 (1989).

[4] Petitioners' reliance (Pet. 26) on an EPA memorandum to the Department of Energy (Pet. App. 197-206) is misplaced. That memorandum addressed the specific situation in which a federal facility included a number of RCRA-permitted units that had received hazardous waste after the effective date for RCRA permit and notice compliance. *Id.* at 198. The areas in question in this case were inactive when RCRA became effective and have been subject to CERCLA removal and remedial action since 1981.

2. Petitioners also argue (Pet. 9-14) that the court of appeals' decision in this case conflicts with decisions of other courts of appeals. Petitioners rely most heavily on *United States* v. *Colorado*, 990 F.2d 1565 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994) (No. 93-786), which held that the State of Colorado could enforce its hazardous waste disposal laws at the Rocky Mountain Arsenal while that site was undergoing a CERCLA cleanup. The United States unsuccessfully petitioned for a writ of certiorari to address whether Colorado could dictate hazardous substance response activities at that site through state law. Although the *Colorado* decision conflicts in principle with the court of appeals' decision here, that inconsistency does not warrant this Court's review.

The United States petitioned for certiorari in *Colorado* primarily because the Tenth Circuit decided an important issue of federal-state relations in conflict with the Sixth Circuit's decision in *United States* v. *Akzo Coatings of America, Inc.*, 949 F.2d 1409 (1991). U.S. Pet. at 16-18, No. 93-786. We noted that the Tenth Circuit's decision in *Colorado* was "at odds" with other appellate decisions, such as *Boarhead* and *Schalk*, *supra*, which had interpreted Section 113(h) to preclude judicial involvement while a CERCLA cleanup was underway. U.S. Pet. at 18, No. 93-786. But we explained that the clash between *Colorado* and *Akzo Coatings* presented the conflict of "greatest practical significance." *Ibid.*

The *Colorado* and *Akzo Coatings* decisions diverged on the question whether a State could bypass CERCLA's so-called "ARARs" process and apply its environmental standards independently of

CERCLA. U.S. Pet. at 18-20, No. 93-786.[5] That important question is not presented here. Unlike Colorado, which refused to join in an Interagency Agreement at the Rocky Mountain Arsenal, "the State of California is a full party to the [Interagency Agreement] and is satisfied that the [Interagency Agreement] is the appropriate mechanism to accomplish the environmental cleanup at [McClellan]." Pet. App. 191. That distinction renders this case far less worthy than *Colorado* of this Court's review.[6]

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[5] The "ARARs" process derives from Section 121(d) of CERCLA, which requires that a remedy achieve the level of cleanup specified pursuant to "applicable" or "relevant and appropriate" requirements under federal or state environmental law. 42 U.S.C 9621(d) (1988 & Supp. V 1993). The ARARs process gives the States an extensive role in the development, selection, and enforcement of the CERCLA remedy. See 42 U.S.C. 9621(d)-(f) (1988 & Supp. V 1993). To the extent practicable, "[f]und-financed removal actions under CERCLA section 104 and removal actions pursuant to CERCLA section 106 shall * * * attain [compliance with ARARs]." 40 C.F.R. 300.415(i).

[6] The *Colorado* decision also differs significantly from this case in important factual respects. The hazardous waste impoundment basin at issue in *Colorado* had received wastes as late as 1982, and the federal authorities had sought a RCRA permit for that basin four years before they had addressed the basin under CERCLA authority. The Tenth Circuit considered those facts significant. The court acknowledged that requiring the Army to obtain the state equivalent of a RCRA permit for the basin would appear to conflict with Section 121(e) of CERCLA, 42 U.S.C. 9621(e), which provides that no permits shall be required for on-site removal or remedial action. 990 F.2d at 1582. The court reasoned, however, that because the Army had already obtained a RCRA permit for the basin before CERCLA authority over that area had attached, Section 121(e) was not violated. See 990 F.2d at

Moreover, other courts of appeals have treated the *Colorado* decision's interpretation of Section 113(h) as an anomaly that is limited by the facts presented in that case. The Eighth Circuit noted that "[t]he Tenth Circuit limited its holding to an action brought by a state, and distinguished *Schalk* on the ground that *Schalk* was a citizen action," adding that a citizen plaintiff could not overcome "the plain wording of section 113(h)." *Arkansas Peace Center*, 999 F.2d at 1218. In this case, the court of appeals did not advert to *Colorado*, but similarly concluded that Section 113(h)'s language was "clear and unequivocal." Pet. App. 10, 11 n.4.[7]

Petitioners are wrong in contending (Pet. 10-12) that the court of appeals' decision conflicts with *Reardon* v. *United States*, 947 F.2d 1509 (1st Cir. 1991), and *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991). The factual situations presented in those cases differ markedly from that here. In *Reardon*, the First Circuit addressed whether a CERCLA lien provision violated due process, 947 F.2d at 1514-1515, while in *Chateaugay*, the Second Circuit addressed whether certain CERCLA response costs were dis-

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1582. Here, the sites in question had ceased receiving waste before RCRA became effective. See also note 4, *supra*.

[7] Petitioners cite (Pet. 13) language from *Colorado*, 990 F.2d at 1577, indicating that the Tenth Circuit would not reach a different outcome in a citizen suit. But that dictum was not necessary to the court's holding. Colorado acted pursuant to its own state statutes, and the Tenth Circuit expressly declined to decide whether the State could enforce its claims under the RCRA citizen suit provision. 990 F.2d at 1578. Cf. *Metropolitan Stevedore Co.* v. *Rambo*, No. 94-820 (June 12, 1995), slip op. 9 ("Breath spent repeating dicta does not infuse it with life.").

chargeable in bankruptcy, 944 F.2d at 1005-1006. Neither of those legal claims amounted to a challenge to any particular removal or remedial action at a CERCLA site. Here, by contrast, petitioners seek relief that "would clearly interfere with the [CERCLA] cleanup." Pet. App. 15, 194.

As petitioners acknowledge (Pet. 9), the court of appeals' decision here is consistent with the decisions of other courts of appeals that have addressed the issue. In this case, as in those cases, the court of appeals determined that Section 113(h) barred environmental challenges that would interfere with an ongoing CERCLA cleanup. Compare Pet. App. 14-17 with *Arkansas Peace Center*, 999 F.2d at 1216-1218 (challenge under RCRA barred by Section 113(h)); *North Shore Gas*, 930 F.2d at 1244 (challenge under RCRA and the National Environmental Policy Act (NEPA) barred by Section 113(h)); *Boarhead Corp.*, 923 F.2d at 1018-1023 (challenge under the National Historic Preservation Act barred by Section 113(h)); *Schalk*, 900 F.2d at 1095-1097 (challenge under NEPA barred by Section 113(h)). The petition in this case, like similar petitions in prior cases, does not present a question warranting this Court's review. See *Arkansas Peace Center* v. *Arkansas Dep't of Pollution Control & Ecology*, cert. denied, 114 S. Ct. 1397 (1994); *Frey* v. *Reilly*, cert. denied, 498 U.S. 981 (1990).

3. Petitioners also dispute (Pet. 27-30) the court of appeals' specific determination that their CWA and RCRA challenges would interfere with the CERCLA cleanup. The court of appeals carefully examined the facts of this particular case and concluded (like the district court) that petitioners "seek[] to improve on the CERCLA cleanup as embodied in the Interagency

Agreement" and that their claims "would clearly interfere with" and "slow" the ongoing response actions at McClellan's inactive waste sites. Pet. App. 14-18. The court of appeals and the district court agreed that petitioners' claims are aimed at altering the CERCLA cleanup and, therefore, are the precise type of "challenges" that are deferred by Section 113(h) until the cleanup is completed. Petitioners disagree with that finding, but there is no reason for this Court to review petitioners' case-specific, factual disagreements with concurrent determinations reached by two lower courts. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

4. Finally, we note that the substance of petitioners' CWA and RCRA claims is insubstantial. The district court correctly found that the permit and notice requirements of those statutes did not apply to the hazardous waste sites that were the subject of the court of appeals' dismissal order. The district court concluded that petitioners' RCRA claims are not meritorious because that statute does not apply to McClellan sites that were abandoned before RCRA permit and notice requirements became effective. See Pet. App. 86-93. The court concluded that petitioners' CWA claims are inapposite because the relevant provisions do not apply to the leaching of contaminants into groundwater under McClellan in the circumstances presented here. *Id.* at 93-98, 156-165. Petitioners have provided no reason to doubt those conclusions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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